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CASES DETERMINED IN THE

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AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BRACKEN.
DOUGHTY *v.* TOWNSON.

[1886 B. 6170.]

C. A.
1889
NORTH, J.
March 19, 22.
C. A.
Oct. 29.

Executors—Administration—Advertisements for Creditors—Time to be limited for making Claims—Newspapers in which Advertisements should be inserted —22 & 23 *Vict. c.* 35, *s.* 29 [*Revised Ed. Statutes, vol. xiii., p.* 515]—*Rules of the Supreme Court*, 1883, *Order* LV., *r.* 45.

There is no absolute rule that notices issued by executors, under sect. 29 of the Act 22 & 23 Vict. c. 35, to creditors and others to come in and claim against the estate of the testator, should be published in a *London* daily newspaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether executors have given such notices as are sufficient to entitle them to the protection of sect. 29, the Court will have regard to the circumstances of the particular case, such as, the place of residence of the testator and his position in life.

Wood v. *Weightman* (1) explained.

A testator was a small farmer in the country. He had lived at the same place for forty years previously to his death, and had never been engaged in any other occupation than that of farming his own land, consisting of about fifty-two acres. After his death his executors issued a notice inviting creditors and others to come in and make their claims against the testator's estate. The notice was published once in each of three local newspapers, and once in the *London Gazette*, but it was not published in any other *London* newspaper. The notice fixed the period of a month from its date for the bringing in of claims, but it was not published till a day or

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(1) Law Rep. 13 Eq. 434.

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two after its date. After the expiration of the notice the executors distributed the estate among the claimants of whose claims they had notice :—

Held, that, as against claims of which they had not then any notice, the notice was sufficient to entitle the executors to the protection given by sect. 29.

Quære, whether an appeal lies against the decision of the Judge on such a point.

THIS action was brought against the surviving executor of *John Chapman,* who was the surviving executor of *John Bracken,* who died in 1825, for an account of the proceeds of the sale of real estate devised by the will of *Bracken.*

By his will, dated the 21st of December, 1819, *Bracken* devised his undivided fourth share in an estate called *Meargill* to *John Chapman* and *Robert Mount* in fee, upon trust for the use of his wife during her life, and from and after her decease upon trust for sale at the discretion of the trustees, and as to the money arising from the sale, upon trust, in the first place, to pay the testator's debts and funeral and testamentary expenses, and then upon trust to pay the surplus (if any) unto and equally between his two daughters, *Alice Cock* and *Mary Solloway*; and in case either of them should die before the same should become due and payable, leaving lawful issue, he willed that such issue should take his, her, or their parent's share thereof respectively. The testator died on the 19th of November, 1825. The widow died in 1843. The two daughters survived the testator.

The Plaintiff alleged that she was a daughter of a son of *Alice Cock*; that *Alice Cock* emigrated to *America* in 1832, and never returned to *England*; and that she died in *New York* on the 15th of April, 1842, leaving no child living at her death. The Plaintiff had recently come from *New York* to *England,* and had taken out administration to the estate of *Alice Cock.*

John Chapman survived *Robert Mount,* and in September, 1847, he, as the sole surviving trustee of *Bracken,* sold the testator's share of the *Meargill* estate, and received the proceeds of sale, which amounted to £109. The deed of conveyance was sent to *America* to be executed, and the money was paid to a solicitor at *Preston* for distribution among the persons entitled. The Plaintiff alleged that *John Chapman* had never accounted for *Alice Cock's* share of the proceeds of sale.

John Chapman died on the 21st of July, 1875. The Defendant was the survivor of three executors appointed by *Chapman's* will.

The Plaintiff claimed an account of the proceeds of the sale of *Bracken's* share of the *Meargill* estate and payment of her share of the proceeds.

By his statement of defence the Defendant (*inter alia*) said: "The Defendant admits that he received assets of *John Chapman's* estate to answer all claims against the same, but he or his co-executor long since fully administered the same in a due course of administration, and advertised for and paid all claims against the said estate as by law required, and he has not now in his possession any such assets."

An order was made that the point of law thus raised should be set down for hearing and disposed of before the trial of the action.

A statement of facts to the following effect was verified by the affidavit of the Defendant.

John Chapman was a farmer. His personal estate was sworn under £3000. At the time of his death he resided at a place called *Ridleys*, in the parish of *Tatham*, near *Lancaster*. He had lived there for forty years previously to his death. During the whole of that period he had farmed his own land, consisting of about fifty-two acres. He had never been engaged in any other trade or business. The parish of *Tatham* was an agricultural parish, *Lancaster* being the market town, and the nearest town in which a newspaper was published. The newspapers having a local circulation in *Tatham* and the neighbourhood were the *Lancaster Gazette*, the *Lancaster Guardian*, and the *Lancaster Observer*. The *Lancaster Gazette* was published twice a week; the other two were weekly papers. After the death of *John Chapman* an advertisement for creditors and others was published by his executors once in each of the following papers, viz., the *London Gazette* of the 21st of September, 1875; the *Lancaster Gazette* of the 18th of September, 1875; the *Lancaster Guardian* of the 18th of September, 1875; the *Lancaster Observer* of the 17th of September, 1875. The advertisement was in the ordinary form used in such cases. It was dated the 16th of September, 1875,

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and it required "all creditors or claimants upon or against the estate of" *John Chapman* to send in particulars of their debts or claims to the executors (whose names and addresses were stated) or to their solicitor, by whom the notice was signed, "before the expiration of one calendar month from the date hereof, after the expiration of which period the executors will proceed to distribute the estate and effects of the said deceased among the persons entitled thereto, having regard only to the claims or demands of which they shall then have had notice; and the said executors will not be liable for any claim or demand of which they shall not then have had notice." After the expiration of this notice the executors distributed *John Chapman's* estate. They had then no notice of the Plaintiff's claim; but it appeared that among the papers that came into their hands as executors was a bundle of papers labelled "Papers about *John* and *Ellen Bracken's* concerns," from which it was alleged they might have been led to a knowledge of the Plaintiff's claims. This bundle had, however, never been examined by the Defendant till after this claim was made.

The point of law was argued before Mr. Justice *North* on the 19th of March, 1889.

Colt, for the Plaintiff:—

The advertisement was not sufficient to exonerate the executors of *Chapman* under sect. 29 (1) of the Act 22 & 23 Vict. c. 35. The time limited for sending in claims was too short; it ought, according to the settled practice, to have been at least a month from the date of the publication of the advertisement. Here a day less than a month was given, even in the case of that paper in which the advertisement was first published.

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(1) Sect. 29 provides: "Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be."

Again, the advertisement ought to have been inserted in a *London* daily paper of large circulation, such as the *Times*. That is in accordance with the usual practice in Chambers: *Wood* v. *Weightman* (1). In that case Lord *Romilly*, M.R., said (2): "These executors have only caused advertisements to be inserted in local newspapers, which is insufficient. In this Court we never allow an estate to be distributed without notice being inserted in the *London Gazette*, and generally we require an advertisement to be inserted in the *Times*. When an estate is administered of a testator in the country, the notice is also inserted in some newspaper having a local circulation in the neighbourhood. Besides, the time within which claims were required to be sent in, namely, three weeks, was too short."

The object of the advertisements is to give notice to the next of kin, as well as to the creditors, of a testator or intestate. If the advertisements are sufficient the executors or administrators will be protected against the claims of next of kin of which they have no notice at the time when they distribute the estate: *Newton* v. *Sherry* (3). If a man's creditors are most likely to be found in the neighbourhood where he lives, his next of kin may be in any part of the world, and an advertisement published in a newspaper such as the *Times* is much more likely to be seen by them than one published in a country newspaper. The executors had constructive notice that some of the persons interested in *Bracken's* estate were in *America*, and they ought to have advertised there as well as in *England*.

Gatey, for the Defendant:—

It is a matter for the discretion of the Court in each case whether the advertisements have been sufficient to entitle the executors to the protection given by sect. 29, and regard will be had to the circumstances of each case. There is no absolute rule, either as to the newspapers in which the advertisement is to be

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(1) Law Rep. 13 Eq. 434.

(2) Law Rep. 13 Eq. 436.

(3) 1 C. P. D. 246.

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published, the number of times of publication, or the length of time which is to be limited for the making of claims against the estate. Having regard to the residence and condition of life of this testator, it was sufficient to publish the advertisements in the *Gazette* and in all the local papers, and the time limited was sufficiently long. It was not necessary that the advertisements should be repeated. The executors did everything which the Chief Clerk would have done if the estate had been administered by the Court.

Colt, in reply.

NORTH, J.:—

I will make inquiries as to the practice in Chambers in such cases.

1889. Mar. 22. NORTH, J. (after stating the provisions of *Bracken's* will, and the other facts, continued):—

It is said that the time fixed by the advertisements for bringing in claims was too short—that it ought to have been a month. In my opinion it was not too short. The time given was a calendar month from the 16th of September, 1875. The advertisements appeared in one local newspaper published on the 17th of September, in two others published on the 18th, and in the *London Gazette*, published on the 21st. Practically a month was given.

But the chief complaint made is that no advertisement was inserted in the *Times*, or any other *London* daily paper of large circulation. That objection is based on some observations of Lord *Romilly* in *Wood* v. *Weightman* (1). It does not appear from the report of that case where the testator lived or what his position in life was. An advertisement had been inserted in four local newspapers, but none had been inserted either in the *London Gazette* or in any *London* newspaper, and Lord *Romilly*, M.R., held that the executors were not protected. [His Lordship read the passage above quoted from the judgment of Lord *Romilly*.] It is said that that amounts to a decision that there must in every case be an advertisement in a *London* daily newspaper. I do not so read it. The question is, what advertisements would be directed by the Court under the particular circumstances of the case? I postponed giving my decision for a few days in order that I might ascertain exactly what the practice in Chambers is, and the view which I had previously formed has been confirmed by the result of the inquiries which I have made. In my opinion the notice is such as would have been directed in Chambers to be given under the circumstances, and the advertisements were sufficient. The testator was a farmer in a small way; he had carried on his business at the same place for forty years, and he had no other employment. There was no reason to suppose that an advertisement in the *Times* would have been of any use to anybody. The present claimant was then in *America*, and has remained there ever since, until she came over here for the purpose, I presume, of these proceedings. There is no reason to believe that any claim was made by her till this action was brought, or that, if other advertisements had been published, any benefit would have accrued to her. The only question is, whether there has been a technical compliance with the rules. The question whether the advertisement should have been inserted more than once is, in my opinion, answered by rule 45 of Order LV. (which is merely a re-enactment of rule 35 of Order XXXV. of the Consolidated Orders of the Court of Chancery). Rule 45 provides that "where an advertisement is required for the purpose of any proceeding in Chambers, a peremptory advertisement, and only one, shall be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements, and any advertisement may be repeated as many times and in such papers as may be directed." In the present case there was no special reason why the advertisements should have been inserted more than once.

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(1) Law Rep. 13 Eq. 434.

In my opinion the insertion of the advertisement in the local newspapers and in the *London Gazette* was amply sufficient, and the Defendant is entitled to the protection of the statute, in the absence of proof that *Bracken's* executors had notice of the Plaintiff's claim before they distributed the estate.

W. L. C.

From this judgment the Plaintiff appealed. The appeal was heard on the 29th of October, 1889.

Seward Brice, Q.C., and *Colt*, for the appeal, relied on *Wood* v. *Weightman* (1).

In the course of the argument Lord Justice *Fry* expressed a doubt whether an appeal could be brought against the decision of the Judge on such a point; which appeared to be left by the Act to his absolute discretion.

Gatey, for the Defendant, was not called on.

COTTON, L.J.:—

This is an appeal against a decision on a statement of facts presented to the Judge—Mr. Justice *North*—and the contention is that the executor, the Defendant, is not relieved from liability in consequence of the insufficiency on various grounds of the advertisements that were issued under the statute.

Now, the first objection was this; that the advertisements were only inserted in the *London Gazette* and in local papers in *Lancashire*. It is said that was wrong; the advertisements ought to have been inserted in some *London* papers—the *Times*, or some other well-known *London* paper. But, in my opinion, we cannot for several reasons come to the conclusion that this is what the Court of Chancery according to its ordinary practice would have required. Here the Judge who has tried the case, and who is experienced in the practice at Chambers, and whose Chief Clerks are experienced too, says he has inquired and he does not find that this is necessary. In the only case referred to, the case before Lord *Romilly*—*Wood* v. *Weightman*—he did not say it was necessary to insert the advertisement in the *Times*, but in the case before him there was no advertisement in any *London* paper, and he says that it ought to have been inserted in the *Gazette*, and that it is usual to insert it in the *Times*. But that does not lay down any such rule as is now contended for. The book of practice to which I have referred—*Daniell's* Chancery Practice—says it should be inserted in the *Gazette* and in such other papers

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as the Judge may direct, and apparently the practice of Mr. Justice *North's* Chambers, which I think were the Chambers my learned brother Lord Justice *Fry* formerly had, is not to require this as an absolute rule, but to say that there must be an advertisement in the *Gazette*, and as to whether there should be other advertisements in other *London* papers, that must be decided by the circumstances of the case. Speaking for myself, I cannot say it was necessary in circumstances like these, where a man has been living for many years in *Lancashire*, apparently not living or carrying on business in *London*, to insert the advertisement in any other *London* paper except the *Gazette*, and I think that a reasonable course was taken in saving expense by not issuing the advertisements in *London* papers, but issuing them in local papers circulating in places where his creditors probably would be found. Then it was said that the time given was not sufficient, and although the time fixed in the advertisement is admittedly sufficient, a month, yet here it is a month from the date of the advertisement, which was the 16th of September, and the earliest of these advertisements was not issued till after that, and the latest was in the *London Gazette* on the 21st of September. I cannot agree that that is insufficient. The advertisement is dated once for all, and then it is inserted in various papers according to the times when they are published, and it must, of course, leave some period of time between the publication and the date in the advertisement. I think that objection is one which cannot prevail.

But then it was said that the executors at the time they issued these advertisements had in their possession a bundle of papers, and that bundle of papers would have led to further advertisements in *America* being issued, if those facts—the case being before the Court of Chancery—had been brought before the Chief Clerk, because there was constructive notice there of a claim made by parties in *America*. Now, in my opinion, it was not necessary for the executors to hunt up all papers they might have, because the Chief Clerk, if the matter had been before him, would have decided what, having regard to the business carried on, and to the position of the testator, and where he lived, would be the reasonable place to issue the advertisements in. But I

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entirely deny that those papers do give any constructive notice, or any notice whatever, of any probability of claim by persons who were in *America* of this particular claim. What were the circumstances? The estate of *Bracken*, the original testator, was sold in 1847. Some of the parties interested were in *America*, and a deed was sent out to *America* to be executed. The proceeds of the sale were paid to a solicitor in *England*. Of course, the executors had no authority to pay it to a solicitor instead of to the parties interested, but for thirty years after the money was handed over to that solicitor, evidently for the purpose of being distributed by him among the persons interested, no claim whatever was raised by those persons who in the circumstances stated would have notice that the property in which they were interested was being sold. In my opinion, the strong presumption is that any claim which any of the parties originally had was satisfied, and, therefore, those papers would not in any way raise a presumption that there was any claim existing by them, and would not, in my opinion, lead any Judge or any Chief Clerk to direct that there should be advertisements in *America*. I think it would have been said that it was a very unnecessary expense, and would have caused delay in dividing the estate.

In my opinion the decision appealed from was right, and the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The question for us is whether in this case the executor gave such notices as in the opinion of the Court in which the executor is sought to be charged would have been given by the Court of Chancery in an administration suit to creditors and others.

Now, although we have entertained the appeal, still it remains an open question, as to which we have given no opinion, whether this is a case in which an appeal would lie. Lord Justice *Fry* threw out a doubt on the subject, and I do not think that it can be said we have decided that point one way or the other. Assuming, for the sake of argument, that the appeal lies, still it seems to me to be an appeal in a case in which we ought to be extremely chary in interfering with the view of the Court below. The Court below, the High Court of Justice, is the Court which is clothed by this statute with the duty of forming the opinion, and at all events, whether an appeal lies or not, unless that opinion is clearly wrong we ought not to interfere.

Now is the opinion which has been expressed by Mr. Justice *North* clearly wrong? The opinion he has expressed is that this is a case in which the executor was not obliged to direct, and in which the Court of Chancery would not, if there had been an administration suit, have directed, that there should be advertisements issued in other papers than in the *London Gazette*, and in the local newspapers. As to the practice of the Court of Chancery, I leave my learned Brothers to express with real authority their view upon Mr. Justice *North's* decision; but, sitting here as a member of the Court which has to decide this appeal, I can only decide on the materials that are brought before me, and I find with regard to the sufficiency of these advertisements the following facts. Mr. Justice *North*, whom we all know, has, after consultation with his Chief Clerk, who is a gentleman of the greatest experience, come to the conclusion that the practice of Chambers in the Court of Chancery does not require what is suggested. My learned Brothers, whose knowledge of the practice of the Court of Chancery is of course obvious, see no reason to differ from him. I think, for the reasons which have been given by the Lord Justice, who has preceded me, the case of *Wood* v. *Weightman* (1) is not an authority in the Appellant's favour, and no authority has been produced to shew that there is a practice of the Court of Chancery against which this decision sins. Nor have the learned and experienced counsel who addressed us been able to shew us that, within their knowledge as counsel, or within the knowledge of those who instruct them, any practice to the contrary existed. How can we on those materials overrule the decision of the Judge who is *primâ facie* clothed by the statute with the duty of forming his own opinion? It is impossible.

Then comes the question of dates of the advertisements, as to which I say nothing beyond what my learned Brother has said.

With regard to the point made, that the executors' knowledge was such as ought to have put them on further advertising, and would have put the Court on inquiry and further advertising if this had been an administration suit, it is sufficient to say, as the Lord Justice has pointed out, that if there was any presumption at all, there was a strong presumption that this claim was satisfied; and there was nothing on the face of the papers, if they had been read, which would have made an executor hold his hand or led the Court to direct other advertisements than those which were issued.

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(1) Law Rep. 13 Eq. 434.

FRY, L.J.:—

I am of the same opinion.

Solicitors for Plaintiff: *Warriner & Kinch*, agents for *Mole & Stone, Derby*.

Solicitor for Defendant: *Hargreaves*, agent for *Johnson & Tilly, Lancaster*.

M. W.

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Nov. 1.

In re CUNO.
MANSFIELD *v.* MANSFIELD.

[1889 C. 846.]

Married Woman—Will—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), *s.* 1, *sub-ss.* 1, 2, 5.

By marriage settlement in 1863 the wife's property was limited (in default of issue) upon trust for her absolutely if she survived her husband, but if she should die in his lifetime then upon such trusts as she should by will appoint, and in default of appointment for her next of kin. She during coverture made a will dated in 1886 by which, if she should die during the coverture, she appointed the fund to trustees upon certain trusts, and she bequeathed to them upon the same trusts all the property she could dispose of by will. She survived her husband, and died without republishing her will, never having had any issue:—

Held (affirming the decision of *Kay*, J.), that the will did not dispose of the settled property.

Sect. 1, sub-s. 1, of the *Married Women's Property Act*, 1882, is to be construed along with sects. 2 and 5, and does not give a married woman power to dispose of property not falling within the scope of either of the two latter sections.

BY a settlement, dated the 29th of December, 1863, made on the marriage of *Emily Mansfield* with *L. F. Cuno*, personal property of the lady was settled upon trust to pay the income to her during her life for her separate use without power of anticipation, and after her death upon trusts for her children and remoter issue as therein mentioned. It was declared that if Mrs. *Cuno* should survive Mr. *Cuno,* and there should be no child of their marriage who being a son should attain twenty-one or die under that age leaving issue, or being a daughter should attain twenty-one or marry under that age, then, subject to the previous trusts, the trustees should stand possessed of the funds in trust for Mrs. *Cuno* absolutely. But if Mrs. *Cuno* should die in the lifetime of Mr. *Cuno,* and there should be no child who being a son should attain twenty-one or die under that age leaving issue, or being a daughter should attain that age or marry under that age, then the trustees were to hold the funds in trust for such persons, and for such purposes as Mrs. *Cuno* should, notwithstanding coverture, by will or codicil appoint, and in default of appointment upon the usual trust for her next of kin.

The husband and wife separated about 1870, and there never was any issue of the marriage.

Mrs. *Cuno* made a will, dated the 1st of May, 1886, and thereby, after reciting the above limitations in default of issue, she appointed that if she should die in Mr. *Cuno's* lifetime, and there should be such default of issue as aforesaid, the trust funds should be transferred to the trustees named in her will, to be held by them upon the trusts therein mentioned. And she devised and bequeathed and appointed all and singular other the estate and effects both real and personal, of or to which she should at her decease be seised possessed or entitled as her separate estate, or over or in relation to which she should have any general power of appointment or disposition exercisable by will, to the same trustees upon the trusts thereinafter declared concerning the same. This will was never republished.

Mrs. *Cuno* died in September, 1888, and her will was proved in the belief that her husband was still living. It was subsequently discovered that he had died in 1887.

The question was then raised by originating summons whether the settled property passed by the will. Mr. Justice *Kay* decided that it did not, and this was an appeal from that decision by one of the legatees under the will.

Warmington, Q.C., and *Ribton*, for the Appellant:--

We admit that *Willock* v. *Noble* (1) is decisive against us unless the case is affected by subsequent legislation. But in that case it was held that the will would have effect given to it so far as it was a will of property which a married woman could dispose of by will. According to *Earl of Charlemont* v. *Spencer* (2) the will of a married woman who had no separate estate at the time will pass after-acquired separate estate. Now, we contend that the *Married Women's Property Act*, 1882, sect. 1, sub-s. 1, places all her property on the footing of separate estate. We cannot after the decision in *Reid* v. *Reid* (3) say that this was property the wife's title to which accrued after the passing of the Act, but we say that under sect. 1, sub-sect. 1, she had power to dispose of it as separate property. The section is not restricted to property acquired after the passing of the Act. Sect. 5 cannot be intended to cut down sect. 1, sub-sect. 1, for both are enabling clauses.

[COTTON, L.J.:—On your construction of sect. 1, sub-sect. 1, what is the use of sect. 5?]

It was put in to preserve the rights of husbands married before the Act. The argument in *Reid* v. *Reid* as to divesting vested rights does not apply here, for this is property in which the husband could not have any interest.

Renshaw, Q.C., and *E. Ford*, for a Respondent in the same interest.

Fischer, Q.C., and *Rawlinson*, for the next of kin, were not called upon.

Stokes, for the trustees.

COTTON, L.J.:—

This is an appeal against a decision of Mr. Justice *Kay*, declaring that the will of Mrs. *Cuno* is inoperative, and that her next of kin take the property comprised in the settlement which has been referred to. Under that settlement the lady in the event which happened of her never having any child took the property absolutely if she survived her husband. If she died in his lifetime she had a power of appointment, and in default of appointment there was a limitation in favour of her next of kin. It is confessed here that, as she survived her husband, the will which she made during his lifetime was inoperative unless it can be made out that under the *Married Women's Property Act*, 1882, she acquired on the passing of that Act the power of disposing of this property as her separate property. Is that so? What is contended for is not that sect. 1 gave it to her as her separate property, but that it gives her a power of disposing of it as if it were her separate property. If that section applies to this particular case so as to make it disposable as her separate property the Appellant is right. But is that so? We cannot look at sect. 1, sub-sect. 1, without referring to the other sections of the Act. That sub-section is this: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." What the Appellant asks us to do is to interpret that sub-section without reference to the words, "in accordance with the provisions of this Act," but, in my opinion, this is only a general section pointing out the provisions the details of which are to be worked out by the subsequent sections. Sect. 2 deals with the case of women married after the commencement of the Act. Sect. 5 deals with the case of women married before the commencement of the Act, and the two sections give them different powers of disposing of property. We have to deal with sect. 5 because this woman was married before the commencement of the Act, and what the section says is this: "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act." This section, therefore, applies only to property which she acquired after the commencement of the Act. Sect. 2, which relates to women married after the commencement of the Act, is different. In my opinion it would have been useless to insert sect. 5 if sect. 1 had the general effect which the Appellant contends for. I cannot

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(1) Law Rep. 7 H. L. 580. (2) 11 L. R. Ir. 347. (3) 31 Ch. D. 402.

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suppose that Parliament in its wisdom after giving by sect. 1 to all married women, whether married before or after the passing of the Act, the general power that is contended for, would have introduced sect. 5 giving a limited power to "women married before the commencement of this Act." It is said that sect. 5 was inserted in order to protect the husband, but it might just as well be said that it was inserted to protect the next of kin. Although Lord Justice *Bowen* in *Reid* v. *Reid* (1) referred to the interest which the husband takes in all property which this section did not give the married woman a power of disposing of, he does not suggest that the section was either meant to protect the next of kin or to protect the husband, he held that it gives a limited power to a woman married before the Act, and that in cases not coming within the power the interest of the husband could not be defeated by the testamentary dispositions of the wife. In my opinion, it would be wrong to consider the words of sect. 1 without referring to those of sect. 5, which shew how the power referred to in general terms by sect. 1 is given, and over what property it extends. The main object of sect. 1, sub-sect. 1, appears to me to have been to introduce an entirely new right in married women to relieve them from the necessity of having a trustee, and to say that they shall, as provided in the subsequent part of the Act, have power to acquire, hold, and deal with real and personal property without the intervention of a trustee. In my opinion, the decision of the Court below was right, and must be upheld.

BOWEN, L.J.:—

I am of the same opinion. If sect. 1, sub-sect. 1, had omitted the words "in accordance with the provisions of this Act," it still would have been necessary to give some operation to sect. 5, and in my opinion, even in that case, the two sections must have been read together, and taken as enacting that only such property as had been acquired after the passing of the Act was to be held and disposed of as separate property. But we are not driven to consider a section which contains only the words "a married woman shall be capable of acquiring, holding, or disposing by will or otherwise of any real or personal property," for the words are: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing." Those words of reference must refer to provisions which are to follow, and the words "shall in accordance with the provisions of this Act," therefore, may be rendered "shall as hereinafter provided." The two subsequent sections to which the words, "in accordance with the provisions of this Act," seem to refer, so far as concerns the present case, are sects. 2 and 5. Sect. 2 deals with a woman married after the Act, and sect. 5 deals with a woman married before the Act. Therefore we must read into sect. 1 the limitations imported by sects. 2 and 5. Sect. 1 is a general section, which gives the key-note to the subsequent sections to which it refers. That makes sense of sect. 5, which otherwise would be superfluous, and what is more, it makes sense of sect. 2, which section, as it seems to me, could not, without the existence of sect. 5, be construed along with sect. 1, so as to make sense. It is also to be remembered that sect. 1 does not merely say "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property," it goes on to say, "in the same manner as if she were a *feme sole*, without the intervention of any trustee," which words give point to the section. I do not think the criticism that has been made on *Reid* v. *Reid* (1) is borne out by the case. I do not understand *Reid* v. *Reid* as having decided that sect. 5 was introduced to protect the husband; but the decision, which seems to me to be a correct decision, went on the principle that, in the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature. That seems good reasoning, but I do not see how it helps the Defendant in the present case.

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(1) 31 Ch. D. 402.

FRY, L.J.:—

I am entirely of the same opinion.

Solicitors: *Crawley, Arnold, & Co.; Surman & Quekett; Penley & Grubbe.*

H. C. J.

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(1) 31 Ch D. 402.

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KEKEWICH, J.

June 1.

C. A.

Nov. 1.

In re ROYLE.
ROYLE *v.* HAYES.

[1889 R. 6.]

Originating Summons—Jurisdiction—Rules of Supreme Court, 1883, *Order* LV., *r.* 3.

A testator directed his trustees to allow his wife to carry on his farming business during widowhood, and to pay to her during widowhood the income of his residuary estate. Four years after his death one of his executors took out an originating summons under Order LV., rule 3, against the other executor and the widow, asking whether a sum of £171, which the testator had handed to his widow shortly before his death, and which stood in her name at a bank, belonged to her or to his estate, and whether she was bound to render to the executors any account of the farming business. The widow objected to the jurisdiction as to the £171, but *Kekewich*, J., overruled the objection, and made an order declaring the sum to be part of the testator's estate:—

Held, on appeal, that there was no jurisdiction on originating summons to decide adversely to the widow that the sum belonged to the testator's estate, this not being a matter which could be decided in an administration suit, but, the widow assenting to have the case tried, the Court heard it on the merits, and held that the evidence shewed a good gift to the widow.

In re Davies (1) approved.

WILLIAM ROYLE, by will, dated the 18th of March, 1885, gave his real and personal estate to *Alfred Royle* and *George Hayes* upon trust that they should allow his wife to carry on his farming business during her widowhood, and to use for that purpose his farming stock, &c., and such part of his personal estate as should be necessary for that purpose, and should pay her the income of his estate during her widowhood, with ulterior trusts for his children. He appointed *Alfred Royle* and *George Hayes* executors and trustees. The testator died on the 29th of May, 1885.

On the 13th of May, 1889, *Alfred Royle* took out an originating summons against *George Hayes* and the widow *Sarah Ann Royle*, asking "that the following questions arising in the administration of the estate of the said *William Royle* may be determined under the Rules of the Supreme Court, Order LV., rule 3, sub-sects. (*a*), (*c*), and (*g*), and relief given in respect thereof without an administration of the estate of the said *William Royle* (that is to say) (1) whether or no the sum of £171 15*s.* received by the said *William Royle* on or about the 24th of May, 1885, from Mrs. *Hope* in part payment of the purchase-money due from her in respect of a plot of freehold land purchased by her from the said *William Royle*, or any part of the said sum, belonged to the said *William Royle* and formed part of his estate at his death on the 29th of May, 1885; (2) whether, if the said sum of £171 15*s.*, or any part thereof, belonged to the said *William Royle* at his death, the use of the same was or is necessary for carrying on his farming business; (3) whether the said *S. A. Royle* ought to render any, and if so, what account to the executors and trustees of the said *William Royle* in respect of the farming business of the said *William Royle*."

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(1) 38 Ch. D. 210.

The testator was on his death bed when the £171 15*s.* was paid to him on the 24th of May, 1885. He handed it to his wife, who, during his life, placed it at a bank in her own name. She contended that he had given it to her absolutely.

The summons was heard before Mr. Justice *Kekewich* on the 1st of June, 1889.

E. S. Ford, for the summons.

Levett, for the Defendants, took a preliminary objection that there was no jurisdiction under Order LV. to decide the first question, and that an action must be brought against Mrs. *Royle* to recover the money.

KEKEWICH, J.:—

The Plaintiff, who is an executor, comes here for protection and might ask for administration of the estate, in which case, an account of the personal estate being directed, the claim might be adjudicated upon. I apprehend that the Court can decide under Order LV. any point which could be decided in an administration action, and the objection must be overruled.

The case was then argued upon the merits. Mr. Justice

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Kekewich considered that Mrs. *Royle* had not established the gift to her, and made an order declaring that the £171 15*s.* formed part of the testator's personal estate at his death, and directing an account of what the residuary personal estate of the testator consisted. Further consideration was adjourned with liberty to apply in chambers. *George Hayes* and Mrs. *Royle* were ordered to pay the costs of the Plaintiff and of two parties served with the summons.

George Hayes and Mrs. *Royle* appealed from the whole order, but did not ask at the bar that the order for an account might be discharged. The appeal was heard on the 1st of November, 1889.

Levett, for the Appellants:—

We appeal on three grounds—(1) that there is no jurisdiction to try a case like this on originating summons; (2) that there is sufficient evidence of a gift *inter vivos* by the husband to the wife; and (3) that there has been no misconduct on the part of *Hayes* which can justify an order for costs against him.

As to the first point, this case does not come within subsects. (*a*), (*c*), or (*g*) of Order LV., rule 3. The question is one which could not be tried in an administration action, but must be the subject of a separate action by the executors against the wife. There is no jurisdiction to determine on this summons any question which could not have been determined in an administration action: *In re Davies* (1).

[He was then stopped by the Court.]

E. S. Ford, for the Plaintiff:—

The widow is legatee for life, and so the question comes under sub-sect. (*a*). The widow must be taken to have submitted to the jurisdiction, for she entered into evidence and argued the case on the merits, and the Court could act: *Re Turcan* (2). A very similar question was tried in an administration action in *Fowkes* v. *Pascoe* (3), and if triable in such an action it is triable on originating summons.

(1) 38 Ch. D. 210.
(2) Ann. Pr. 1889, p. 728.
(3) Law Rep. 10 Ch. 343.

[THE COURT then asked *Levett* whether he would assent to the Court deciding the question on the merits. *Levett* assented on the terms of the present order as to costs being discharged, and an affidavit filed since the hearing before Mr. Justice *Kekewich* being admitted. These terms were agreed to, and the case was argued on the question whether a gift to the wife was made out.]

COTTON, L.J. (after stating his reasons for coming to the conclusion that a gift to the wife was made out, proceeded):—

Mr. Justice *Kekewich* dealt with this originating summons as giving him jurisdiction to decide adversely to the widow that she was not entitled to this sum of money, but that it belonged to her husband's estate. The summons gave him jurisdiction to decide points relating to the administration of the estate, questions arising between legatees and the executor. This is not a question between the executor and a legatee as such, but a question between the executor and a person who holds money which he alleges to belong to the estate of the testator, and which she alleges to be her own. In an administration suit the regular course would have been, after directing accounts of the personal estate, to add a special inquiry whether this sum of money had been given to the widow. She then, if she thought fit, could come in and say, "I submit to the jurisdiction, and am willing to have the question tried under this inquiry as if an action had been brought against me." But if she did not do so, there would be no jurisdiction to decide adversely against her in the administration action, that she was not entitled to the money. She has submitted to the jurisdiction before us, and we have therefore decided the case on the merits. The declaration and the order as to costs must be discharged, and the Plaintiff must pay the costs of the appeal and all the costs below, except such as would have been incurred if the summons had only asked for an account of the residuary estate.

BOWEN, L.J.:—

I am of the same opinion; and should not have added anything had we not been differing from the Court below. As regards jurisdiction, the case is one which could not be decided

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on originating summons adversely and without consent; it does not come within Order LV. We were asked to apply the doctrine of *Re Turcan* (1), but all that was there decided was that the bringing a claim gives the Court jurisdiction as against the claimant,—that he cannot invoke the aid of the Court, and then if the decision is against him, appeal on the ground that the Court had no jurisdiction. There was therefore no jurisdiction in the present case; but as the widow has assented to our hearing the case on the merits, we have done so. [His Lordship then went into the evidence, and stated his conclusion to be that the gift was established.]

FRY, L.J.:—

I am of the same opinion on both points. Order LV. was not intended to give jurisdiction except as to matters which could be decided in an administration action. I entirely agree with the view taken by Mr. Justice *North*, in *In re Davies* (2). [His Lordship then went into the merits, and stated his conclusion to be that the gift was established.]

Solicitors: *Bower, Cotton & Bower*, agents for *Vaughan, Cheadle; Yeilding, Barlow & Piper*, agents for *Cobbett, Wheeler & Cobbett. Manchester.*

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(1) Ann. Pr. 1889, p. 728.

(2) 38 Ch. D. 210.

H. C. J.

BLAKEY *v.* LATHAM.

[1887 B. 1473.]

C. A.
1889
Nov. 6.

Practice—Time for appealing—Interlocutory or Final Order—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15.

An appeal by a Plaintiff from a judgment dismissing his action having been dismissed with costs, the Plaintiff moved for liberty to set off against the costs payable to the Defendant *L.* under that order certain costs payable to the Plaintiff by *L.* partly in that action and partly in another action between the same parties. *G.* claimed a lien upon these costs for his costs as *L.*'s solicitor in the first-mentioned action. *Kay,* J., made an order allowing the set-off, but as regards the costs in the secondly mentioned action subject to any lien *G.* could make out before the Taxing Master for his costs in the firstly mentioned action. *G.* appealed:—

Held, that as regards time for appealing, the order was interlocutory and not final, being only an order for working out the rights given by a final judgment.

THIS was an appeal by *A. V. Green* from an order of Mr. Justice *Kay* (1).

On the 26th of April, 1888, this action against *Latham* and *Lowden* (formerly trading in partnership as *Latham & Co.*) for infringement of a patent was dismissed. The Plaintiff appealed. *Lowden* appeared separately on the appeal, and on the 19th of February, 1889, it was dismissed with costs as against him. *Green,* who was his solicitor, served the Plaintiff with a notice that he claimed a lien for his costs on the costs given to *Lowden* on the appeal.

On the 8th of February, 1888, in an action of *Blakey* v. *Latham* (1886 B. 5365) against the same Defendants for infringement of trade-mark, judgment was given for the Plaintiff with costs for an injunction and account of profits. An appeal from this judgment was dismissed with costs on the 14th of May, 1888.

On the 10th of November, 1888, before the appeal in the patent action an order was made in the patent action allowing the Plaintiff to set off the costs of the trade-mark action and of the appeal in that action against the costs payable by the

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(1) 41 Ch. D. 518.

Plaintiff in the patent action. The costs of the motion were given to the Plaintiff.

On the 20th of December, 1888, *Lowden* was ordered to pay to the Plaintiff the costs of a motion to commit in the trade-mark action.

On the 16th of April, 1889, *Lowden* issued execution for his taxed costs of the appeal in the patent action. The Plaintiff paid the amount to the sheriff, giving him notice not to part with the money as he, the Plaintiff, claimed a set-off.

The Plaintiff then moved against *Lowden*, *Green*, and the sheriff for liberty to set off against the costs of the appeal in the patent action—(1) the profits to be ascertained in the trade-mark action; (2) the costs of the motion to commit in the trade-mark action, and (3) the costs of the motion to set off of the 10th of November, 1888, in the patent action, and for an injunction against the sheriff.

On the 10th of May, 1889, Mr. Justice *Kay* made an order declaring the Plaintiff entitled to set off against the costs payable under the order of the 19th of February, 1889—(1) the costs of the motion of the 10th of November, 1888; (2) also (but subject to the lien (if any) which the Taxing Master should find *Green* to have as solicitor for *Lowden* for costs in the patent action) the costs of the motion to commit of the 20th of December, 1888. The sheriff was directed to pay the money in his hands to stakeholders.

Green appealed from this order, but did not serve his notice of appeal until more than twenty-one days from the passing of the order.

S. Woolf, for the Plaintiff, took the preliminary objection that the appeal was out of time, the order being interlocutory: *Collins* v. *Vestry of Paddington* (1).

T. T. Fillan, and *C. E. E. Jenkins*, for the Appellant:—

This is a final order, for it determines the rights of the parties and there is nothing more to be done in the action. In *Standard Discount Company* v. *La Grange* (2) Lord Justice *Brett* in reality defines what is a final order when he says: "No order, judgment, or other proceeding can be final which does not at once affect the *status* of the parties, for whichever side the decision may be given, so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff," and again: "I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute." His Lordship held the order in the case then before the Court to be interlocutory, because it was not "the last step which must be taken in order to fix the *status* of the parties with respect to the matter in dispute." Here the order finally settles the rights of the parties. This order being for working out the decree is to be treated as part of the decree: *The City of Manchester* (1).

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(1) 5 Q. B. D. 368.

(2) 3 C. P. D. 67, 71.

COTTON, L.J.:—

The only question is whether the order appealed from is interlocutory. I am of opinion that it is. It is true that Lord Justice *Brett* in the case of *Standard Discount Company* v. *La Grange* (2) used expressions which have been relied on to shew that this must be a final order. His Lordship says that no order, judgment, or other proceeding can be final which does not at once affect the *status* of the parties for whichever side the decision may be given, so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff. But his Lordship does not say that every order which does so settle the *status* of the parties is a final order for the present purpose. In one sense every order comes to an end when judgment is delivered, but it does not come to an end so far as working out the directions contained in it is concerned. Any order, in my opinion, which does not deal with the final rights of the parties, but merely directs how the declarations of right already given in the final judgment are to be worked out is interlocutory, just as an order made before judgment is interlocutory where it gives no final

(1) 5 P. D. 221.

(2) 3 C. P. D. 67, 71.

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decision on the matters in dispute, but merely directs how the parties are to proceed in order to obtain that final decision.

In the present case there have been judgments given, one of which gives costs to the Defendant *Lowden*, the other two give costs to the Plaintiff. The order which was appealed from (I do not enter at all into the question whether it was right or wrong) was an order which directed how those directions in the final judgments were to be worked out. That in my opinion is interlocutory and not final, and therefore this appeal, if brought at all, ought to have been brought within the time limited for interlocutory appeals. I understand that there is no question that it was not brought within that time, and therefore the objection prevails.

FRY, L.J.:—

I am of the same opinion. I am glad I am not called upon to give anything like an exhaustive definition of the word "interlocutory," but of this I am clear—that where a final judgment has been pronounced in an action, and subsequently an order has been obtained for the purpose of working out the rights given by the final judgment, that order has always been deemed, and rightly deemed, to be interlocutory. This is such an order, and therefore the notice of appeal was given too late.

Solicitors: *A. V. Green; Salaman.*

H. C. J.

In re DAVID.
BUCKLEY *v.* ROYAL NATIONAL LIFEBOAT INSTITUTION.

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1889
Nov. 12, 13.

[1888 D. 2283.]

Charity—Mortmain—Interest in Land—Bonds of Harbour Trustees—Assignment of "rates, tolls, rents, &c."—9 Geo. 2, c. 36 [Revised Ed. Statutes, vol. ii., p. 403].

Harbour trustees, incorporated by a special Act with which the *Commissioners Clauses Act*, 1847, was incorporated, had power given to them to borrow money on mortgage of the tolls, rates, and dues authorized by the Act. The mortgagees were authorized to enforce payment of arrears of interest by the appointment of a receiver. All rates, dues, and income received by the trustees were to be carried to the credit of "The Harbour Fund," and the moneys carried to that credit were to be applied—(1) in paying the interest on moneys borrowed; (2) in maintaining and regulating the harbour and its navigation; (3) in payment of certain rent-charges; (4) in payment of sums directed to be set apart to make a sinking fund for paying off mortgages, and the surplus was to be applied for the general purposes of the Act. The trustees borrowed money on the security of bonds for £100 each, by each of which they assigned to the mortgagee such proportion of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the sum of £100 bore to the whole money borrowed, to hold the same to the mortgagee until the £100 with interest was paid. Among other tolls were tolls which the trustees were authorized to demand before persons, cattle, and carriages were allowed to pass over certain bridges belonging to the trustees:—

Held (affirming the decision of *North*, J.), that these bonds were not mortgages of the undertaking as in *Gardner* v. *London, Chatham, and Dover Railway Company* (1), but specific mortgages of a share of the bridge tolls and other tolls and rates arising under the Act, that the bridge tolls being paid for passing over bridges on the land of the trustees were an interest in land, and that the bonds, therefore, were impure personalty within 9 Geo. 2, c. 36.

THIS was an appeal from a decision of Mr. Justice *North* (2) that bonds given by the *Swansea* Harbour Trustees savoured of realty so as to come within 9 Geo. 2, c. 36.

The trustees were constituted a corporation by the *Swansea Harbour Act*, 1854 (17 & 18 Vict. c. cxxvi.), for purposes connected with the harbour of *Swansea*. Sect. 7 incorporated the

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(1) Law Rep. 2 Ch. 201.

(2) 41 Ch. D. 168.

Commissioners Clauses Act, 1847, except sect. 82, and except certain sections relating to the election and rotation of Commissioners. Sect. 8 made the trustees a body corporate with a common seal and with power to purchase, take, hold, and dispose of lands and other property for the purposes, but subject to the restrictions, of the Act, and to put the Act into execution. Sect. 43 vested in the trustees all the estates, lands, buoys, beacons, lights, lighthouses, moorings, works, property, choses in action, claims and demands to which the trustees under certain Acts repealed by the present Act were entitled, but subject to all incumbrances thereon, and the liabilities of the old trustees were transferred to the new. Sect. 55 incorporated the *Lands Clauses Act*, 1845. Sect. 60 empowered the trustees to carry out various works, and sect. 63 authorized them to enter upon, take, and use for those purposes any of the lands deposited in a book of reference. Sect. 85 provided that the trustees should maintain in the bridges, erected over the River *Tawe*, near the *Pottery*, and at the *Corporation Quay*, and in the bridge erected over the *Cut*, such openings or swing bridges as therein mentioned, and should make such by-laws, rules, and orders respecting those bridges as seemed to them expedient to protect the traffic over the same and also the navigation. Sect. 136 provided that the trustees from time to time might erect and maintain toll-gates upon or adjoining the bridges erected over the River *Tawe*, near the *Pottery*, and at or near the *Corporation Quay*, and such toll-houses or other conveniences near or adjoining to the toll-gates as they might think proper. Sect. 137. "The trustees by their lessee or collector may after the commencement of this Act demand and take at every or any such gates, before any person on foot, or any horse, cattle, calf, sheep, lamb, or pig, or any cart or carriage, be permitted to pass on or over those bridges or either of them, or through the toll-gate, such tolls as the trustees at their meetings from time to time direct not exceeding the respective sums following (that is to say) . . . ."

Divers other tolls and rates were authorized by the Act, but are not noticed, as the decision of the Court of Appeal turned only on the bridge tolls.

Sect. 99 provided that for the purpose of enabling the trustees to carry out the works authorized by the Act, they might from time to time in addition to the moneys borrowed under the repealed Acts, or reborrowed under this Act in lieu of any moneys paid off, borrow any sum not exceeding £80,000 "on mortgage of the several tolls, rates, and dues, by this Act authorized." Sect. 102 provided for the setting apart a yearly sum as a sinking fund to pay off borrowed moneys. Sect. 103. That to secure the payment of interest half-yearly on the mortgages, the treasurer should, out of the *Swansea* Harbour Fund, on the last day of every month reserve and place to a distinct account intituled, "Accruing interest on mortgages account" one-twelfth part of the interest on the total amount of the mortgage debt of the trustees, and in case there should not be sufficient funds in his hands, then the whole amount in his hands, and should set aside the deficiency out of the first money that might come to his hands on account of the *Swansea* Harbour Fund, and that no other payment whatever should be made by him from such fund until the required amount should be set aside as aforesaid. Sect. 104. "The mortgagees under the recited Acts and this Act respectively may enforce the payment of the arrears of interest due to them by the appointment of a receiver, and the amount of debt to authorize a requisition for a receiver shall be £5000." Sect. 108. "All the moneys of the old trustees at the commencement of this Act, and all rates, dues, damages, penalties, and other sums of money and income whatsoever received by or for the use or benefit of the trustees shall be paid to the credit of the '*Swansea* Harbour Fund.'" Sect. 110. "The moneys from time to time carried to the credit of the *Swansea* Harbour Fund shall be applied, firstly, in paying the interest on moneys borrowed under the recited Acts and this Act; secondly, in maintaining and regulating the harbour and the navigation thereof; thirdly, in payment of any rent-charges secured under this Act by way of equivalent to the Duke of *Beaufort*, his heirs or assigns, or to the corporation; fourthly, in payment of the sums by this Act required to be set apart to form a sinking fund, and the surplus, if any, shall be applied for such of the purposes of this Act as the trustees from time to time think fit."

By one of the bonds dated the 23rd of January, 1855, issued under sect. 99, the harbour trustees, in consideration of £100 paid to their treasurer, granted and assigned to the mortgagees "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of £100 doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys to hold unto the said [mortgagees] and the survivor of them, and the executors or administrators of such survivor and their or his assigns from this day until the said sum of £100 with interest at £5 per centum per annum for the same shall be lawfully paid and satisfied." The other bonds were in the same form.

The bridges were supported on land belonging to the trustees, and the approaches to them were partly over land of the trustees. The bridges passed over land of the trustees.

Mr. Justice *North* decided that these bonds were specific mortgages of the rates and tolls, and that the bridge tolls were so connected with land that a mortgage of them was incapable of being given to a charity except in manner provided by 9 Geo. 2, c. 36.

Certain charities, to which gifts had been made by a deed not inrolled according to 9 Geo. 2, c. 36, out of a fund comprising bonds of the above description, appealed from this decision.

Vaughan Hawkins, and *Dibdin*, appeared for the appeal, and repeated the arguments urged in the Court below, the substance of which appears sufficiently in the former report.

Everitt, Q.C., and *G. E. Cruickshank*, for the Plaintiff, were not called upon.

LORD COLERIDGE, L.C.J. :—

We have to determine whether a set of bonds, a specimen of which is before us, are or are not so far connected with land and the possession and the use of land, as to bring them within the provisions of 9 Geo. 2, c. 36. If they are not, then Mr. Justice *North* was wrong, but if they are, then Mr. Justice *North* was right.

These are bonds the power to issue which is created by sect. 99 of the *Swansea Harbour Act*, 1854. They closely follow the words of the form of bond given in the schedule to the *Commissioners Clauses Act*, 1847. Each bond sets out that it grants and assigns to the holders of the bond "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of £100 doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents and other moneys." Those are the words of the schedule to the *Commissioners Clauses Act*. The *Swansea Harbour Act* leaves out in the 99th section the word "rents," and empowers the trustees to "borrow any sum not exceeding £80,000 on mortgage of the several tolls, rates and dues by the Act authorized." Therefore, the words of the bond and the words of the Act of Parliament empowering the bonds to be issued, are different in respect of the word "rents" occurring in the bond and not in the Act. It may be that the bond to the extent of the word "rents" is a bond which the trustees were not authorized by the *Swansea Harbour Act*, 1854, to issue. That is a question upon which a good deal might have to be said if it was necessary to determine it, for the *Commissioners Clauses Act* which is incorporated with the *Swansea Harbour Act* appears to give to the trustees power to mortgage rents, though the words of the special Act do not appear to give them power to do so. If it were necessary to consider that point an interesting and possibly a difficult question might arise. But I do not think it necessary at all to discuss that, because supposing that the insertion of the word "rents" is unauthorized, the bond would still be good as far as tolls rates and dues are concerned.

The first question we have to consider is, whether the tolls rates and dues mortgaged in this bond, or any of them, are within the provisions of 9 Geo. 2, c. 36. Much has been said in argument about the old case of *Knapp* v. *Williams*, which was determined in 1798 by Lord *Loughborough*, and is reported in a note to a case before Lord *Eldon* (1). Now, that case is certainly open to the observations that have been made upon it by several judges, especially by my learned Brother in the case of *In re*

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(1) 4 Ves. 430, n.

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Christmas (1), in which he goes at some length into the case, but does not appear to me to express any decided opinion. If *Knapp* v. *Williams* (2) is binding upon us, then there seems to be clearly an end of this case and of Mr. *Vaughan Hawkins's* argument, for there bonds not distinguishable from those in this case were held to be within the statute. But the case is interesting because Lord *Loughborough* draws the distinction (a distinction which I apprehend is perfectly well established), that there are two sorts of tolls, that there is a toll so intimately connected with land that a mortgage or grant of such a toll would be within the statute, and other tolls, which though not clearly severable from the possession of land, give no right in the land, so that a mortgage of them would not be within the statute. I apprehend that no one who has commented upon the case has at all doubted that that distinction is well founded in law, and important to be borne in mind in a case of this kind.

Now within which of these two classes do the bridge tolls fall? Are they so connected with the possession of land as to be within the statute, or are they not? That is a question which to a great extent depends on matters of fact. I confess it would have been more satisfactory to my mind if I could have had a clearer idea of the position of the bridges in respect of the use of which tolls arise; but the best judgment I can form upon it is that the tolls are really money paid for the use of land belonging to the trustees, money paid by the persons who go over the bridges and the approaches of the bridges, and therefore money so intimately connected with land, and so completely arising from the possession of land, that a mortgage of such tolls would be within the statute. That seems to me to be reasonably clear. It might have been made more clear if we had known more about the position of the subject-matter in respect of which the tolls arise, but I think it sufficiently and reasonably clear that the tolls in this case are so completely connected with the use of land, and arising out of it, as to bring a mortgage of them within the statute.

But the Appellant's counsel have raised a second point, viz., that the true effect of the bonds is not to mortgage specifically the rates, dues, and tolls, but that if certain clauses of the *Swansea Harbour Act*, especially the 102nd, the 103rd, and the 108th, are looked at, it will be seen that these are really mortgages, not of the tolls, but of the *Swansea* Harbour Fund, that the *Swansea* Harbour Fund is really and substantially the same thing as the undertaking of the *Swansea* Harbour, and that therefore these mortgages are within the principle of *Gardner* v. *London, Chatham, and Dover Railway Company* (1), and other cases of that nature, and are brought within the protection of the cases in which it has been held that where the whole undertaking is the subject-matter of a mortgage, that mortgage is not within 9 Geo. 2, c. 36, because it is a mortgage of that which comes out of the land, after it is severed from the land. If that could be made out, the Appellants would be entitled to succeed, because the case would be within the authority of decided cases, with which we have no power to interfere, and with which I do not wish to interfere. But the argument does not appear to me to be sound, for the answer is that these clauses which give directions to the trustees that out of the *Swansea* Harbour Fund they shall keep down the interest on the mortgages, and create a sinking fund to put an end to the mortgages, are merely directions to the trustees as to payment of interest on the mortgages, and as to laying by a fund for repayment of the principal, and do not affect the nature of the mortgages themselves.

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(1) 33 Ch. D. 332, 340.

(2) 4 Ves. 430, n.

The result, to my mind, is that the judgment of Mr. Justice *North* is right, and must be affirmed.

COTTON, L.J.:—

I am of the same opinion.

The Appellants' first point, as I understand it, is this, that these debentures do not create a charge on any specific tolls or dues, but create a charge on the general undertaking—that is, on the money after it has been received by the trustees, and has gone into their coffers—that the general fund thus formed, or a charge on that general fund, is not an interest in land, from whatever source the moneys came originally, and that therefore these debentures are not within 9 Geo. 2, c. 36. Now each of

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(1) Law Rep. 2 Ch. 201.

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these debentures or mortgages is created under sect. 99 of the *Swansea Harbour Act*, and with the force and power of the *General Act of* 1847, and it purports to assign to the mortgagees "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act, as the said sum of £100 doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys." If those words are to have full effect given to them, it could not be contended that a mortgage of rents is not an interest in land. The Lord Chief Justice has called our attention to the fact that this charge was created not only under the special Act, but under the general Act, and we find that the debentures are in the form given in the schedule to the general Act, and this explains the introduction of "rents," though they are not mentioned in sect. 99 of the *Swansea Harbour Act*. It is not, however, in my opinion, necessary to decide whether the debentures had any effect on rents. Mr. *Vaughan Hawkins*, in support of his argument that these were mortgages of the undertaking, relied principally on *Gardner* v. *London, Chatham, and Dover Railway Company* (1). But, to my mind, that case does not apply, for the debentures there were of an entirely different character from those in the present case. In that case the debentures were in the form prescribed by the *Companies Clauses Consolidation Act*, 1845, and thereby the company purported to assign to the mortgagee the general undertaking of the company as defined by their special Act, and all the tolls and sums of money arising upon or out of the said general undertaking. Although there is there a reference to tolls and sums of money arising upon or out of the general undertaking, yet the Court construed the debenture as creating a charge, not on tolls specifically, but only on the general undertaking, and held that tolls and sums of money were mentioned only as incidental to and subject to the purposes of the general undertaking as defined by the Act. That Act required and directed that the railway should be kept up and maintained, and therefore the Court said that the mortgage did not enable the mortgagee to take any particular land or any particular money arising from the undertaking, since that would interfere with the carrying on of the undertaking. It was held to be a mortgage of the undertaking as defined by the Act, and subject to the obligations cast upon the railway company by the Act. Here, on the contrary, no power is given to charge generally the undertaking of this harbour, but a power is given to charge the tolls. Then in the direction which is given as to the application of the *Swansea* Harbour Fund, which comprises, as Mr. *Vaughan Hawkins* pointed out, all sums of money which come into the coffers of the trustees, the first direction is to pay the interest on these debentures, which is entirely different from the direction contained in the Railway Act, and which was dwelt upon by Lord Justice *Turner* in *Gardner* v. *London, Chatham, and Dover Railway Company* (1). These considerations, to my mind, prevent the cases on which Mr. *Vaughan Hawkins* relies from applying to the present case, and we have to consider whether a specific charge on the tolls is within the Act 9 Geo. 2, c. 36.

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(1) Law Rep. 2 Ch. 201.

The Lord Chief Justice has referred to the case of *Knapp* v. *Williams* (2), which we had to consider a good deal in the case of *In re Christmas* (3), and I do not propose to consider that case now as fully as I did then, but the last passage in Lord *Loughborough's* judgment points out what we have to consider, viz., whether these bridge tolls can be considered as what are called tolls thorough, or whether they are tolls by which some interest in the land is given.

Now, what are the facts? We ascertained from Mr. *Vaughan Hawkins* that he considered that part of the approaches to these bridges and the land by which these bridges were supported was the property of the trustees of the dock company, and theirs only, and that the approaches to the bridges passed over their own land. Then is not the toll which they have a right to receive from people passing over the bridges connected with land as being money rendered to them for the use of their land? In my opinion it is. They have power given by the Act to stop any one who attempts to pass their toll-gate and to pass over their bridges

(1) Law Rep. 2 Ch. 201.

(2) 4 Ves. 430, n.

(3) 33 Ch. D. 332.

unless he has paid this sum of money. That, to my mind, is a sum rendered to them for the use of their land, and which they are entitled to claim for the use of their land. It is not at all like a toll which they are to take from certain persons without reference to the use of any land.

In the case of *In re Christmas* (1) we came to the conclusion that the duties there charged were sums of money in no way connected with the use of land. They were sums to be paid by the masters of all ships which came within certain limits, though not in any way using the land of the commissioners. It could not be said that the right to receive such duties was any interest in land. Here the tolls were sums to be received only from persons who used the land of the trustees in a particular way, and in my opinion it would be wrong to hold that the right to receive them was not an interest in land.

In my opinion Mr. Justice *North's* decision is right, and the appeal fails.

FRY, L.J.:—

This case has been so elaborately and so earnestly argued that I ought perhaps to add a few words to express my conclusions upon it.

The local Act in question (17 & 18 Vict. c. cxxvi) incorporates nearly the whole of the *Commissioners Clauses Act,* including those clauses of the Act which relate to mortgaging the property of the commissioners. That general Act contains a form of mortgage which comprises tolls, rates, dues, and also "rents." Sect. 99 of the local Act enables the trustees to mortgage the tolls, rates and dues, not saying anything about rents. They have in fact created or affected to create mortgages of the tolls, rents, rates and dues. The first question seems to me to be this. Does the mortgage validly include the rents? The question is a somewhat nice one upon which I do not intend to express any opinion. If the mortgages did include the rents then it seems to me too clear for argument that they created an interest in land. If on the other hand the word "rents" ought to be left out, then we are driven to the inquiry whether any of the tolls, rates, and dues are so connected with land is to be an incorporeal hereditament.

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(1) 33 Ch. D. 332.

The cases of *Knapp* v. *Williams* (1), and *In re Christmas* (2), have drawn and affirmed a distinction between two kinds of tolls, the one which is not connected with the land so as to make it an incorporeal hereditament, the other which is so connected with the land as to make it such. Now whether that distinction was rightly drawn in the particular case of *Knapp* v. *Williams* with regard to the particular tolls there in question, is entirely immaterial for the purpose of our present inquiry. It is enough that decisions which are binding upon me have drawn that distinction, and we are therefore compelled to inquire to which of the two kinds of tolls the tolls in question belong.

Now I find that the tolls in question are tolls to be levied for passing over a bridge, and I find that the 137th section provides that the trustees may demand and take, at every one of their gates which they may erect, the tolls in question, before any persons or cattle are permitted to pass through the toll-gate; and I find further that there is power for mortgagees of these tolls to obtain the appointment of a receiver. By sect. 87 of the general Act the receiver may be authorized to receive the whole or a competent part of the tolls. I can have no doubt that such receiver is authorized to occupy so far as is necessary the toll-house, and to shut the toll-gate unless the toll is paid, and to receive the toll into his hands. It appears to me, therefore, that the mortgage carries with it the right to have recourse to the land itself, and it further appears to me, considering the admissions made by Mr. *Vaughan Hawkins* with regard to the facts of the case, viz., that the bridges or the substantial part of the land connected with the bridges is the property of the trustees themselves, that the tolls so to be raised are part of the usufruct and enjoyment of the land. That being so, it appears to me to be reasonably plain that the tolls in question are tolls so connected with the land as to constitute them an incorporeal hereditament. Mr. *Vaughan Hawkins* has argued (in spite as it appears to me of the plain language of the terms of the charge) that the charge is not on the tolls, rates, and dues, but is a

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(1) 4 Ves. 430, n.

(2) 33 Ch. D. 332, 340.

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charge upon the floating balance for the time being of the Harbour Fund, and he bases that upon the clauses in the Act which contain directions as to the application of that Harbour Fund. It appears to me that it is impossible effectually to contend that that is the true meaning of the mortgage. A mortgage which charges the tolls, and which enables the mortgagee to obtain a receiver of the tolls, cannot in my judgment be a mere charge upon the floating balance of a fund of which the toll is only one of the constituents. I think that the true effect of the Act in this respect is very much as if the trustees had created a mortgage upon certain real estate, and had accompanied that with a direction given to their bankers to apply the balance of their banking account from time to time in keeping down the interest on that mortgage.

I think, therefore, that Mr. Justice *North* was quite right in his view, and that this appeal must be dismissed with costs.

Solicitors: *Murray, Hutchins, & Stirling; Clayton, Sons, & Fargus.*

H. C. J.

In re STEPHENS.
WARBURTON *v.* STEPHENS.

[1888 S. 552.]

KAY, J.
1889
June 25.

Limitations, Statutes of—37 & 38 *Vict. c.* 57, *ss.* 8, 10 [*Revised Ed. Statutes, vol. xvii., pp.* 253, 254]—*Gift of Real and Personal Estate—Blended Fund—Charge of Debts on Real Estate—Debt barred against personal, not against real, Estate—Advertisements for Creditors—Sending in of Claim by Creditor not equivalent to bringing of Action.*

A testator gave all his property upon trust for sale and conversion into money, and "after payment thereout" of his debts and funeral and testamentary expenses, to be held upon certain trusts. The executor advertised for creditors, and a creditor sent in a claim. More than six, and less than twelve, years after the alleged debt was incurred, the executor, having applied for and failed to obtain from the creditor particulars of the claim, took out a summons asking that the claim might be adjudicated upon by the Court:—

Held, as to the real estate, that the testator's debts being by his will charged thereon, the period of limitation was twelve years, and consequently the claim was not barred.

Whether as to such proportion of the debt as was properly attributable to personal estate the claim ought not to be considered as barred, *quære.*

ADJOURNED SUMMONS.

Frederick Robert Stephens, who died on the 9th of August, 1882, by his will, dated the 4th of August, 1882, gave all the property of which he was possessed to his trustees and executors therein named "upon trust to sell and convert the same into money, and, after payment thereout" of his just debts and funeral and testamentary expenses, to divide the same into two equal parts, which were to be invested and held upon certain trusts for his two nieces for their lives, and after their respective deaths for their children. The testator declared that his trustees might postpone the sale and conversion of all or any part of his property, but his real estate was to be considered as personalty from the time of his death.

The testator died possessed of real and personal estate.

The Plaintiff, *J. Warburton*, was the only executor who proved the will, and in November, 1883, he issued the usual advertisements for creditors. The Defendant, on the 28th of December, 1883, through his solicitors, sent in a claim for a debt alleged to be due to him, the amount of which was not specified.

The Plaintiff requested to be furnished with particulars of the debt, and a correspondence took place in the course of which the Defendant's solicitors stated that their client had not been able to let them have the exact amount of his claim.

On the 25th of November, 1887, one of the tenants for life under the will having died, the Plaintiff, being desirous of proceeding to a distribution of the estate, again applied to the Defendant's solicitors for particulars of the alleged debt, but without success.

The Plaintiff accordingly on the 7th of February, 1888, took out this summons asking that the claim of the Defendant might be adjudicated upon by the Court, and that in default of the Defendant substantiating his claim, the Plaintiff might be declared to be at liberty to proceed with the distribution of the testator's estate without regard to the claim.

From the evidence it appeared that the claim was in respect of sums from time to time advanced by the Defendant to or for the benefit of the testator during a period of four years or thereabouts expiring in or previously to the year 1881.

Renshaw, Q.C., and *Frederic Thompson*, for the Plaintiff:—

The claim of the Defendant is in respect of a simple contract debt, and is barred by the *Statute of Limitations*, more than six years having elapsed since any part of the debt was incurred, and no proceedings for recovery thereof having been taken by him.

Marten, Q.C., *Inderwick*, Q.C., and *T. H. Robertson*, for the Defendant:—

By the terms of this will there is a charge of the testator's debts on his real estate; *Shallcross* v. *Finden* (1); *Tompkins* v. *Tompkins* (2); and the period of limitation is therefore not six years but twelve years under 37 & 38 Vict. c. 57; and consequently the claim is not barred.

(1) 3 Ves. 738.

(2) Prec. Ch. 397.

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[KAY, J., asked whether there was any authority for the proposition that, under a will like the present, where real and personal estate were blended together and subjected to payment of debts, a debt barred as against the personal estate was kept alive against the real estate.]

There is no direct authority, but the proposition is involved in *Scott* v. *Jones* (1). In that case there was a direction for payment of the testator's debts out of his personalty, and, if that were insufficient, out of certain real estate, and the question was whether a debt was kept alive beyond the six years. It turned out that the supposed real estate was in fact personalty, and, that being so, it was held that the debt was not kept alive against the personal estate, but Lord *Lyndhurst* said that "had it been real estate, in that case the plaintiff would have been entitled to recover."

[KAY, J., referred to the observations of Lord *Romilly* in *Cadbury* v. *Smith* (2), and pointed out that in *Scott* v. *Jones* there was not the circumstance which was present here of a blending of real and personal estate, and a conversion, for all the purposes of the will.]

That circumstance cannot prevent the creditor having the benefit of the charge; he is none the less entitled to go against the real estate because the personal estate is given together with it. The persons entitled to the real and personal estate must adjust their rights amongst themselves. Here the real estate is believed to be ample for payment of this debt, and it is therefore immaterial to consider whether the debt is kept alive against the personalty. In *In re Hepburn* (3), where there was a direction substantially to the same effect as that in the present will, Mr. Justice *Cave* followed *Scott* v. *Jones*.

Further, we submit that it is not open to the Plaintiff to set up the statute.

[KAY, J.:—Is there any admission by him of the debt?]

The creditor sent in his claim in answer to the statutory advertisements, and the Plaintiff as executor accepted it.

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(1) 4 Cl. & F. 382, 397.

(2) Law Rep. 9 Eq. 37.

(3) 14 Q. B. D. 394.

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[KAY, J.:—Is sending in a claim equivalent to bringing an action?]

By issuing the advertisements, and accepting and investigating the claim sent in, the Plaintiff elected to administer the estate out of Court. The object of the statutes 13 & 14 Vict. c. 35, ss. 19–25; 22 & 23 Vict. c. 35, s. 29; and 23 & 24 Vict. c. 38, s. 14, was to obviate the inconvenience and expense of an administration action when an executor desired to be protected against debts of which he was unaware, and the acceptance of a claim by the executor is the statutory equivalent of a judgment in favour of the particular creditor.

Renshaw, in reply:—

Under this will there is no charge of debts on the real estate. There is no direction for payment of debts out of real estate. There is merely a trust of the proceeds of sale of real and personal estate "after payment thereout" of the debts. That is simply a reference to what the law would do. Although there is a mixed fund, yet the law would first apply the personalty in payment of debts, and the realty would only be resorted to if the personalty were insufficient. In *Scott* v. *Jones* (1) there was an express direction that the real estate was to be sold to raise any deficiency of the personalty. Lord *Lyndhurst*, in the passage referred to, was addressing himself to the distinction between a mere charge of debts, and a trust for payment of debts out of the proceeds of sale of realty—a distinction which has been often considered: see *Dickenson* v. *Teasdale* (2); *Jacquet* v. *Jacquet* (3); *Tench* v. *Cheese* (4).

[KAY, J., referred to *Bowyer* v. *Woodman* (5).]

But if the direction in this will be anything more than a reference to the ordinary course of law, then the effect of it is that the debts are payable rateably out of realty and personalty: *Allan* v. *Gott* (6); there must therefore be an apportionment, and, so far as the personal estate is concerned, the claim must fail.

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(1) 4 Cl. & F. 382.
(2) 1 D. J. & S. 52.
(3) 27 Beav. 332.
(4) 6 D. M. & G. 453.
(5) Law Rep. 3 Eq. 313.
(6) Ibid. 7 Ch. 439.

KAY, J. 1889 *In re* STEPHENS. WARBURTON *v.* STEPHENS.

KAY, J.:—

The testator in this case gave all the property of which he was possessed to trustees in trust to sell and convert the same into money, and after payment thereout of his just debts and funeral and testamentary expenses to divide the same into two equal parts, which were to be held upon certain trusts.

That was evidently throwing together into one mass all his property, real and personal, and subjecting the whole of it to the payment of his debts. Beyond question it was a charge of the debts upon the whole of the property he had, if it was not an express trust for the payment of the debts. It is indifferent now whether there was a charge or a trust, because, since the *Real Property Limitation Act*, 1874, a trust does not keep a debt alive longer than a charge, and a charge does not keep the debt alive for a longer time than twelve years. There was no administration action brought, nor has there been any judgment for creditors generally or any judgment whatever for this particular creditor. The course which the executor took was to advertise for creditors under the statute (1), and on the 28th of December, 1883, the solicitors of the present Defendant sent in a claim for a debt due to him, the amount of which was not specified. Thereupon the executor asked for particulars. Particulars were not sent, but a correspondence took place in which most certainly the executor never admitted the debt. There was no payment on account of the debt, nor any admission of it in any shape. After that the matter seems to have slept, the claimant taking no steps to enforce his claim, until on the 7th of February, 1888, the executor, being determined to have the matter disposed of one way or the other, took out this summons asking that the claim might be adjudicated upon by the Court. The creditor took no action of any kind. Nevertheless it is said that because he sent in a claim in writing, and the executor has come to have that claim adjudicated upon by the Court, there is something in the statutes 13 & 14 Vict. c. 35, 22 & 23 Vict. c. 35, s. 29, and 23 & 24 Vict. c. 38, which keeps the debt alive. I do not follow the argument. Those statutes were only meant to relieve an executor from personal responsibility, so that if, after taking certain measures to ascertain what the debts are, he discharges such debts as he knows of, he may be freed from any personal liability for debts of which he does not know, and as to which the creditor has not chosen to send in a claim after advertisements issued. That is the purpose of those statutes in this respect, and, so far as I know, the only purpose. There is not, so far as I am aware, a single sentence in those statutes which indicates that a creditor who makes a claim but does not put the matter in train for adjudication by some proceeding of his own before the *Statute of Limitations* has run, is to have his debt kept alive. His merely making a claim does not keep his right alive. For six years after the debt which this creditor claims was incurred he did nothing beyond sending in this claim. I am very clearly of opinion that he has done nothing whatever to keep his debt alive, and that the statute has been running uninterruptedly since the debt was incurred, and, if the debt is barred in six years, then six years have run before this summons was taken out.

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(1) 22 & 23 Vict. c. 35, s. 29.

Now it was decided in *Scott* v. *Jones* (1), where there was a somewhat similar direction to that which I have read from this will, that such direction did not create a trust which kept the debt alive against the personal estate. In *Scott* v. *Jones* there was a direction to pay debts out of real and personal estate, but there was not any real estate, and the question was whether the direction for payment of debts out of real and personal estate kept the debt alive as against the personal estate beyond six years, and it was held, after considerable deliberation, three years' deliberation—the House of Lords being accustomed to be more deliberate in those days than at the present time—that the debt was not kept alive. The same point came before Mr. Justice *Cave* in the case of *In re Hepburn* (2). In *Scott* v. *Jones* there were leaseholds which the testator by his will treated as freeholds. In fact he recited, if I remember aright, that he was entitled in fee simple. That was a mistake; the property was only leasehold, and therefore only personalty. In *In re Hepburn* there was a gift very like the gift in the present case—a devise of real estate to the trustees of a will upon trust for sale, with a direction that the proceeds of sale should form part of the testator's residuary personal estate, and a

(1) 4 Cl. & F. 382.

(2) 14 Q. B. D. 394.

bequest of all the residuary personal estate upon trusts for sale and conversion, with a direction that the moneys arising from such sale and conversion should, together with the proceeds of sale of his real estate, be applied in payment of his debts and testamentary expenses. There was no real estate, and Mr. Justice *Cave* held, in accordance with *Scott* v. *Jones* (1), that the direction as to payment of debts did not keep alive any debts against the personal estate beyond the six years after which, according to the *Statute of Limitations*, they would be barred. In *Cadbury* v. *Smith* (2) the point was drawn to the attention of Lord *Romilly*, and he said this: "It has been determined in *Scott* v. *Jones* and that class of cases, that if a testator gives real and personal estate in trust to pay debts and legacies, that is no bar to the *Statute of Limitations*, for if a testator merely imposes upon his executors that which it is their regular duty to do, he does not, except as to real estate, create a trust." Observe the words "except as to real estate." It is not the regular duty of executors to apply real estate in payment of debts. Therefore where the testator by his will gives his real estate to the same persons whom he appoints executors and makes a blended fund, and directs them to apply that fund in payment of his debts, he does impose upon them a duty which is not within the ordinary scope of the duties of executors, because as executors they have no such duty as to the real estate. Accordingly, as Lord *Romilly* intimates, the reasoning of *Scott* v. *Jones* does not apply to the case of a charge on real estate. I can have no doubt whatever that by this will at least a charge, if not an express trust, is created for payment of debts out of the proceeds of the real estate, and it is indifferent now, as I have said, whether it is a charge or trust, because under the recent Act the time of limitation is the same, viz., twelve years, whether it be a charge or a trust. Now, if that period of time applies then the claim in this case has admittedly not been barred. The alleged debt was incurred within twelve years. There may remain another question upon which I will not give an opinion now. According to the series of cases which were considered in *Allan* v. *Gott* (3) such a direction as there is here would make the debts

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(1) 4 Cl. & F. 382. (2) Law Rep. 9 Eq. 42. (3) Law Rep. 7 Ch. 439.

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payable rateably out of the real and personal estate. It is quite open to argument whether such part of the debt as is properly attributable to personal estate ought not to be considered to be barred. But I leave that for consideration when I know the facts. At present it seems to me the whole debt is not barred, that there is a charge on the real estate which would be available for twelve years, and, therefore, the debt is not, so far as regards the real estate, barred at present. Accordingly I shall make a declaration that the debt is not barred by the *Statute of Limitations* so far as the real estate is concerned; I shall refer the rest of the matter to Chambers, and the costs will be reserved.

Solicitors: *Warburton & De Paula; Crosse & Sons.*

C. C. M. D.

KAY, J.
1889
July 31.

LONGBOTTOM *v.* SHAW

[1887 L. 635.]

Patent Action—Particulars of Objections—Successful Defendant—Costs—Certificate—Taxation—Patents, Designs, and Trade Marks Act, 1883, *s.* 29, *sub-ss.* 2, 6.]

Where, at the trial of a patent action in which the Defendant has delivered particulars of objections pursuant to sect. 29, sub-sect. 2, of the *Patents, Designs, and Trade Marks Act*, 1883, the Plaintiff's case breaks down at the opening on the sole ground that his specification shews that the alleged invention is not a proper subject for a patent, so that it becomes unnecessary to go into the Defendant's case at all, and the Court consequently gives judgment for the Defendant with costs, the Defendant is not entitled, on taxation, to the costs of his particulars of objections, since the Court will not in such a case go into the particulars merely for the purpose of certifying for those costs under sect. 29, sub-sect. 6.

But, *semble*, when the case has been decided upon the result of the Defendant's cross-examination of the Plaintiff's witnesses, and not merely on the question of the validity of the specification itself, it may be proper for the Court to look into the particulars with a view to certifying for the costs of them.

ADJOURNED SUMMONS.

This action, commenced in 1887, was for the infringement of the Plaintiff's patent for "Improvements in reels or frames for holding pile and other fabrics." The specification stated that the invention related to reels or frames for holding pile or other fabrics, and consisted of a novel method of making the hooks for attaching the fabrics to the ends of the reels or frames, and also of improvements in the method of securing such hooks to the ends or arms of the reel or frame. And the specification proceeded: "Hitherto the said hooks have been separately riveted to the arms of the reels or frames; by my invention the hooks are formed in rows preferably sufficiently long to complete one arm of the reel or frame, and the said rows are attached to such arms by two or more rivets or their equivalent."

The Defendant delivered, with his statement of defence, particulars of objections, as required by sect. 29, sub-sect. 2, of the *Patents, Designs, and Trade Marks Act*, 1883.

At the trial, before Mr. Justice *Kay*, on the 28th of June, 1888, the Plaintiff's case broke down, so that it became unnecessary to open the Defendant's case at all, or to call his witnesses, and thereupon the Judge dismissed the action with costs, resting his judgment on the ground that the invention claimed by the Plaintiff's specification was not a proper subject-matter for a patent; but an application by the Defendant's Counsel, under sect. 29 of the *Patents, Designs, and Trade Marks Act*, 1883, for a certificate as to the costs of the Defendant's particulars of objection and of his witnesses was refused (1).

The judgment was affirmed on appeal on the 4th of February 1889 (2).

On the taxation of the costs under the original judgment the Taxing Master allowed the costs relating to or governed by the particulars of objections, including the costs of the Defendant's witnesses. The costs of the particulars themselves related to a great extent to their preparation.

The Plaintiff then carried in objections to the taxation on the ground that, the Judge not having granted a certificate at the trial on the particulars of objections, it was not competent for the Taxing Master to allow the items connected with them; but the Taxing Master overruled the objections, relying on *Parnell* v. *Mort* (3), and also on *Griffin* v. *Feaver* (4).

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(1) 5 Rep. Pat. Cas. 497, 502; 6 Ibid. 143.

(2) 6 Rep. Pat. Cas. 143.

(3) 29 Ch. D. 325.

(4) 6 Rep. Pat. Cas. 396.

The Plaintiff then took out this summons to have his objections allowed and to have the taxation varied accordingly.

Aston, Q.C., and *W. J. Waugh*, for the Plaintiff:—

The Court not having certified as to the costs of the particulars of objections, pursuant to sect. 29, sub-sect. 6, of the *Patents, Designs, and Trade Marks Act*, 1883, the Defendant cannot be allowed those costs.

Goodeve, for the Defendant:—

We could not have safely taken the case into Court without being ready with witnesses to support our particulars of objections. It is unreasonable and hard that a defendant should be deprived of costs which he has properly incurred merely because at the trial it turned out that the plaintiff's case was so weak that it was unnecessary to go into the defendant's case at all. The result is, that if a defendant in a patent action has so strong a case that the Judge decides in his favour without calling upon him to open his case, he loses a material part of his costs. I submit that the sub-section only applies where the Defendant's case is gone into: it then throws the responsibility on the Judge at the trial to say whether the objections are reasonable and proper.

An action in which the defendant's case is not gone into at the trial is outside the Act altogether, and therefore no certificate of the Judge is required to entitle the Defendant to all his costs.

[He cited *Parnell* v. *Mort* (1); *Arnold* v. *Bradbury* (2); *Honiball* v. *Bloomer* (3); *Cole* v. *Saqui and Lawrence* (4); *Cornish* v. *Keene* (5); *Heath* v. *Smith* (6); *Peddell* v. *Kiddle* (7).]

KAY, J.:—

I am very sorry for the Defendant, but I cannot make an Act of Parliament, nor alter an Act that has been made. Here is an Act of Parliament which seems to me to be very clear and express in its terms. The 29th section of the *Patents, Designs, and*

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(1) 1 Rep. Pat. Cas. 4; 2 Rep. Pat. Cas. 55; 29 Ch. D. 325.

(2) Law Rep. 6 Ch. 706.

(3) 10 Ex. 538.

(4) 40 Ch. D. 132.

(5) 1 Webs. Pat. Cas. 501, 510.

(6) 3 E. & B. 256.

(7) 7 T. R. 659.

Trade-marks Act, 1883, begins in this way: "(1) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or the Judge, at any subsequent time, particulars of the breaches complained of. (2) The defendant must deliver with his statement of defence, or by order of the Court or a Judge, at any subsequent time, particulars of any objections on which he relies in support thereof. (3) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him. (4) At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered." Then comes sub-sect. 5, as to giving leave to amend particulars. Sect. 29 then continues: "(6) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a Judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case."

Now, when this case came on for trial the Court did not call upon the Defendant at all, as I understand, but decided the case upon the Plaintiff's opening; and mainly from the fact, as I read the judgment—I do not speak from any recollection—that it appeared on the face of the specification on which the Plaintiff relied what exactly was the invention claimed. "Hitherto," said the specification, "the said hooks have been separately riveted to the arms of the reels or frames; by my invention the hooks are formed in rows preferably sufficiently long to complete one arm of the reel or frame, and the said rows are attached to such arms by two or more rivets or their equivalent." The judgment is nothing but an examination of the specification, and the conclusion of the Court is that the alleged invention there described was not sufficient to be the subject-matter of a patent—that it was not a thing for which a monopoly could be properly claimed; and thereupon the Court dismissed the action with

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costs. Then at the end of the judgment the Court was asked to certify that the particulars of objections delivered by the Defendant were reasonable and proper. They had not been proved of course: and the answer given by the Court, right or wrong, was this: "We have not looked at your objections; we do not know what they are. If the judgment of the Court is right, which you must assume it is at present, you need not have sent any objections in, but might have relied upon the want of sufficient invention as disclosed by the specification itself."

Then the case went to the Court of Appeal, which took the same view (1). No doubt there was a very able cross-examination, which the Court of Appeal to some extent relied on, though it does not appear to have been relied upon at all in the judgment of the Court of first instance. Then the appeal was dismissed; and when the appeal was dismissed Mr. *Moulton*, on behalf of the Defendant, said that the Judge in the Court below had given no certificate on the objections which went to prior user: "although we say that they were a perfectly good defence, and that it was quite reasonable to put them in. It is very hard that we should lose all those costs because the Plaintiff's case is so bad as to break down on this point." Accordingly an application was then made to the Court of Appeal to reverse the judgment of the Court below so far as it had refused to grant a certificate.

The report runs thus: Lord Justice *Cotton* says: "I think we expressed our opinion in *Boyd* v. *Horrocks* (2) that the statute does not require us to go through a patent case which may take days, when it can be decided on one short point at once, for the purpose of deciding whether the defendant ought substantially to have these costs. Mr. *Moulton*:—Quite so. *Cotton*, L.J.:—You got the benefit of that the other day. *Lindley*, L.J.:—You are inviting us to hear a great number of objections in order to give you the costs. If we had heard them we should know all about the costs, but I do not feel disposed to investigate those points for the purpose of giving costs." That is to say:—"We will not give you the costs; we will not grant you a certificate; we will not go into those objections when we have decided the whole case upon a short point upon hearing the plaintiff's

(1) 6 Rep. Pat. Cas. 143, 147.

(2) 6 Rep. Pat. Cas. 152.

case alone, without looking at them." I must say that seems to be entirely binding on me; and what is more, I confess that my reason goes with it. There might well be a case where the matter was decided against the plaintiff without calling upon the defendant's counsel, and yet the Court, relying upon the evidence obtained by the defendant in cross-examining the plaintiff's witnesses, might think it right to look at the particulars of objections, and allow the costs of such particulars of objections as were in fact made out by the cross-examination. I can quite understand that case occurring, and therefore I do not say that there might not be, in such a case as that which I have just described, a propriety in the Court looking into the particulars of objections, and saying whether they were reasonable or not, having regard to the cross-examination. But in the present case, rightly or wrongly, the Court came very clearly to the conclusion that it was not bound to do that, because the case had been decided absolutely on the words of the specification itself. It seems to me that the Act of Parliament is quite express. Sect. 29, sub-sect. 6, says that: "On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a Judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case." No such certificate has been given here, and accordingly it seems to me that no costs of particulars properly so called can possibly be allowed.

Now the costs which are in question here are, to a great extent, costs of preparing these particulars and things of that kind. I have looked at the bill: "Instructions for particulars of objections, drawing same, fee to settle," and so on. Without a certificate it seems to me impossible to allow those costs, and therefore the matter must go back to the Taxing Master (unless the parties can agree what are the costs that are to be disallowed) with the direction that no costs are to be allowed of any of the particulars.

Solicitors: *Emmett, Son, & Stubbs*; *Van Sandau & Co.*

G. I. F. C.

KAY, J.
1889
Aug. 5.

In re ROBERTS.

[1889 R. 315.]

Solicitor and Client—Mortgage to Solicitor—Solicitor's Remuneration—Profit Costs, Right to charge.

A solicitor cannot charge his client with profit costs for the preparation of a mortgage from the client to himself.

ADJOURNED SUMMONS.

In 1880 *John Miles Evans* applied to his solicitor, *Thomas Roberts,* to procure him a loan of £2100 upon property he was about to purchase at *Great Malvern. Roberts* endeavoured to obtain the money from various persons, but finding he could not procure the whole amount he arranged to obtain £1200 of it at 4½ per cent. from a third person on first mortgage, and to lend the remaining £900 himself on second mortgage at 5 per cent., and to this arrangement *Evans* acceded. The purchase was accordingly carried out and both mortgages were prepared by *Roberts,* the solicitor, and duly executed. The mortgage to *Roberts* contained a clause enabling him, and any other person interested in the mortgage money as a solicitor, to charge and be paid for business done by him in relation to such mortgage money or the mortgaged premises in like manner as if he were not himself interested therein, and as if he were acting as solicitor for another person.

On the 26th of March, 1889, *Evans* obtained an order for delivery of *Roberts*' bill and taxation thereof, whereupon *Roberts* delivered a bill made out according to the system of charging before the General Order under the *Solicitors' Remuneration Act,* 1881, and comprising all the work connected with both the mortgages. Upon taxation the Taxing Master allowed the charges for preparing the £1200 mortgage, but disallowed, amongst other items, the whole of the costs of preparing the £900 mortgage to *Roberts,* though he allowed certain items for work done after the execution of the mortgage, holding that such work came within the power of charging contained in the mortgage. *Roberts* carried in objections to the disallowance of the items for the preparation of the mortgage to himself, alleging as his grounds of objection that the work charged for had been undertaken upon *Evans*' own instructions; that the work was for *Evans*' benefit in enabling him to borrow money; and that he, the solicitor, was professionally responsible to *Evans* for the proper negotiation of the terms of the entire loan of £2100, and also for the proper preparation and completion of the second mortgage for £900 (part thereof) to himself. The Taxing Master, however, overruled the objection on the ground that a solicitor could not make a profit of his position as mortgagee.

Roberts then took out this summons to have his objections allowed, and for a reference back to the Taxing Master to vary his certificate accordingly.

Marten, Q.C., and *Maidlow*, for *Roberts*:—

There is no authority upon the question whether or not a solicitor who prepares a mortgage to himself from his client is entitled to profit costs; but, in the absence of any authority to the contrary, we submit that the solicitor is so entitled. It seems unreasonable that when a client asks his solicitor to advance him money on mortgage, the solicitor should not be entitled to charge for his time and trouble in preparing the mortgage.

[KAY, J.:—In *Sclater* v. *Cottam* (1) Vice-Chancellor *Kindersley* says that a solicitor-mortgagee acting for himself in a suit in defence of his own title cannot, as against a second mortgagee, claim more than his costs out of pocket.]

That case is overruled by *London Scottish Benefit Society* v. *Chorley* (2), which decides that where a solicitor defends an action in person and obtains judgment he is entitled to the same costs as if he had employed a solicitor. And *In re Donaldson* (3) decides that where one of a body of mortgagees is a solicitor, acting as solicitor in enforcing the security, he is entitled to profit costs.

Levett, for *Evans*:—

A mortgagee cannot, in the absence of express contract, affix to the mortgaged property any burden clogging the equity of redemption; neither can he impose a personal burden on his mortgagor. The mortgagee stands in a *quasi*-fiduciary relation towards the mortgagor. Here the mortgagee was preparing the mortgage in his own interest and for his own benefit, and, therefore, he is not entitled to charge for it as solicitor. The mortgagee can only charge the mortgagor for the preparation of the mortgage by his, the mortgagee's, solicitor; but here the mortgagee had no solicitor, for he did the work himself. I, therefore, submit that I cannot be charged with any profit costs for the preparation of this mortgage.

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(1) 5 W. R. 744; 3 Jur. (N.S.) 630.

(2) 12 Q. B. D. 452, 454; 13 Q. B. D. 872.

(3) 27 Ch. D. 544.

Marten, in reply:—

Profit costs were allowed to a solicitor-mortgagee in *Price* v. *M'Beth* (1), a redemption suit.

KAY, J.:—

In this case the solicitor not only prepared the mortgage to the third person, the costs of which, being mortgagee's costs, the mortgagor has admitted his liability to pay, and, therefore, allowed them to be included in the bill, but he has also charged profit costs for the preparation of the mortgage to himself. The reason why these costs should not be allowed is not that of any fiduciary relation between the solicitor and the mortgagor, but that they are not mortgagor's costs at all. They are mortgagee's costs; and the only way in which they could be allowed is, if there is a mortgagee against whom they could be charged, and who would have to pay them to his own solicitor, and could then charge them to the mortgagor. But here there was no mortgagee who had to pay to any solicitor: the mortgagee has no solicitor to prepare the mortgage, for he does the work himself, and, therefore, he cannot charge any costs, because they never existed at all.

I therefore disallow these costs.

Solicitors: *Taylor, Stileman, & Underwood*, agents for *T. & T. Roberts, Worcester*; *Ellis, Munday, & Bartrum.*

(1) 33 L. J. (Ch.) 460.

G. I. F. C.

In re HARRISON.
TOWNSON *v.* HARRISON.

NORTH, J.
1889
Oct. 26.

[1889 H. 1517.]

Will—Administration—Covenant by Testator to pay Annuity—Personal Estate insufficient—Apportionment of Liability between Tenant for Life of Real Estate and Remaindermen.

A testator devised all his real estate (except two specified estates) to trustees in fee, in trust for his son for life, with remainder in trust for the son's first and other sons successively in tail male, with remainders over. And he devised the two specified estates upon similar trusts for the benefit of his two daughters respectively for life, with remainders to their respective issue. The testator had upon the marriage of his son entered into a covenant, for himself, his heirs, executors and administrators, with the son, to pay, during the joint lives of the son and his wife, an annuity of £700 to the son or his wife. After payment of the testator's debts and testamentary expenses his personal estate was insufficient to provide for the annuity:—

Held, that the annuity must be treated as a debt of the testator; that it must be apportioned between the three devised estates according to their respective values; and that each tenant for life, on paying his proportion of the annuity would be entitled, in respect of each payment of the annuity, to a charge upon the *corpus* of the estate, but must keep down the interest upon the amount so charged.

Allhusen v. *Whittell* (1) distinguished.

ORIGINATING SUMMONS for the determination of certain questions arising in the administration of the estate of *Isaac Harrison*, deceased, of whose will the Plaintiff was the sole acting trustee and executor.

The testator by his will, dated the 3rd of July, 1871, after appointing the Plaintiff and two other persons trustees and executors of his will, and bequeathing some pecuniary legacies and annuities (which he charged on his real estate), devised all the manors, messuages, lands, tenements and hereditaments of whatsoever tenure of or to which he was then or should be entitled at the time of his decease (except his estates at *Gaddesby* and the *Gilroes* thereinafter devised) unto and to the use of his said trustees in fee, upon the trusts thereinafter declared, viz., upon trust out of the rents and profits of the said devised estates to pay the several annuities thereinbefore charged thereon, and then upon trust to pay certain yearly sums thereinafter specified for the benefit of his son *Isaac Henry Harrison*, and, subject thereto, his said hereditaments should be held in trust for his said son and his assigns during his life, with remainder in trust for his first and other sons successively in tail male, with divers remainders over. The testator devised all his manors, messuages, lands, tenements and hereditaments of whatsoever tenure situate at *Gaddesby* unto and to the use of his said trustees in fee, in trust for his daughter *Beatrice Mary* and her assigns during her life, with remainder in trust for her first and other daughters successively in tail male, with divers remainders over. The testator devised all his manors, &c., at or near the *Gilroes* and *Leicester Frith*, and known as his *Gilroes* estate, to his trustees in fee, in trust for his daughter *Catherine Maria* and her assigns during her life, with remainder in trust for her first and other sons successively in tail male, with divers remainders over. The residue of the testator's personal estate was given on trust for his son and his two daughters.

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(1) Law Rep. 4 Eq. 295.

The testator died on the 6th of June, 1887. The trustees and executors (other than the Plaintiff) renounced probate of the will and disclaimed the trusts thereof.

On the 20th of November, 1882, a deed was executed between the testator of the first part, *Isaac Henry Harrison* (his son) of the second part, and *Mary Marfitt* (a lady to whom the son was then about to be married, and to whom he was shortly afterwards married), whereby, in consideration of the then intended marriage, the testator, for himself, his heirs, executors, and administrators, covenanted with the son, his executors and administrators, that, if the intended marriage should take place, the testator, his heirs, executors or administrators, would during the joint lives of the son and *Mary Marfitt*, or until the son should become bankrupt, &c., pay unto such one of them the son or *Mary Marfitt* as the testator, his heirs, executors, or administrators, should in his or their sole discretion think fit, the annual sum of £700, to be considered as accruing from day to day, but to be payable by equal quarterly payments, determinable nevertheless in the events thereinbefore mentioned, and would make the first of such quarterly payments at the end of three months after the solemnization of the intended marriage. The deed contained a further covenant by the testator with his son that, in case the intended marriage should take place and the son should survive *Mary Marfitt*, and there should be any issue of the intended marriage living at the time of her death, the testator would, during the life of the son or until the son should become bankrupt, &c., pay to the son the annual sum of £700; a further covenant by the testator with his son, that, in case the intended marriage should take place, and *Mary Marfitt* should survive the son, and there should be any issue of the marriage living (or *in ventre sa mère*) at the death of the son, the testator would, during the widowhood of *Mary Marfitt* and the existence of any issue of the marriage, or until *Mary Marfitt* should assign or dispose of the annuity, &c., pay to her the annual sum of £700; and further covenants by the testator with his son to pay an annuity of £500 to *Mary Marfitt* during her widowhood, in case she should survive the son, and there should be no issue of the marriage living (or *in ventre sa mère*) at the time of his death, or being such all should die during her widowhood; and to pay an annuity of £150 a year to *Mary Marfitt* during her life, in case the intended marriage should take effect and she should survive the son and marry again, both these annuities being made determinable in the same way as the previous annuity to her. The annuities were to be substitutional not cumulative.

The Defendants to the summons were, the testator's son, *Isaac Henry Harrison*, and *Mary Harrison* his wife; *Isaac Frank Odams Harrison*, an infant, their eldest son; and the testator's two daughters, *Beatrice Mary Harrison* and *Catherine Maria Harrison*.

The summons asked for the determination of (*inter alia*) the following questions:—

Whether the several annuities respectively covenanted to be paid by the testator by the deed of the 20th of November, 1882, to *Isaac Henry Harrison* and *Mary Harrison* respectively, ought to be valued, and upon what principle, and how?

How and in what manner the amounts at which the annuities shall be valued respectively ought to be raised, and out of what part or parts of the testator's estate, and in what proportions, and how?

NORTH, J.
1889
In re
HARRISON.
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HARRISON.

The Plaintiff deposed that, after providing for the testator's debts and other liabilities, he should have left of the personal estate only £1500 towards the claim which arose under the deed of the 20th of November, 1882. He had not paid anything on account of the annuity since the testator's death. The annuity was owing since the 20th of May, 1887.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Plaintiff:—

The annuity should be paid out of the income of the estate, and liberty should be given to apply to the Court after the lapse of a reasonable time to have it ascertained how the payments should be apportioned between the *corpus* of the estate and the income: *In re Muffett* (1); *Yates* v. *Yates* (2); *Allhusen* v. *Whittell* (3). The annuities are a debt of the testator, and are payable out of his real estate, the personal estate being insufficient, but as between the tenant for life and the remaindermen the liability must be apportioned.

Everitt, Q.C., and *Ingle Joyce*, for the son and his wife:—

The value of the annuities as at the time of the testator's death should be capitalized and charged on the estate: *Yates* v. *Yates*; *Allhusen* v. *Whittell.* The expense of recurring valuations would be very great; the proportions payable by the tenant for life and the remaindermen should be ascertained once for all. The tenant for life ought not to be charged with prospective interest on a debt which has not yet accrued. The summons might be amended by asking the Court to decide the question how and in what manner the instalments of the annuity are to be raised, and, the tenant for life being willing to pay the annuity as it becomes due, in what proportions, as between him and the remaindermen, the instalments ought to be borne, and to what charge upon the *corpus* of the estate he is entitled.

Napier Higgins, Q.C., and *Woodroffe*, for the daughter *Beatrice*:—

There need not be, as in *Yates* v. *Yates*, a speculation as to

(1) 39 Ch. D. 534. (2) 28 Beav. 637.
(3) Law Rep. 4 Eq. 295.

the value of the annuity. The question is, to what charge on the estate is the tenant for life entitled in respect of each payment of the annuity as he makes it. He ought to lose only the interest upon the capital sum which is charged.

B. B. Swan, for the daughter *Catherine*.

Cozens-Hardy, in reply:—

The effect of what is suggested would be to throw on the remaindermen the whole of each instalment of the annuity, except the interest upon it. The tenant for life is entitled to a charge upon the estate in respect of the value, as at the date of the death of the testator, of each payment of the annuity which he actually makes, interest being calculated at 4 per cent.

NORTH, J.:—

I think the proper course to adopt is this. The tenant for life is tenant for life of the estate, and is entitled as such to the whole income of it, but there are certain contingent debts of the testator, created by deed in his lifetime, in the shape of life annuities, which may become payable. Some payments have become due since the testator's death; the annuitants are still alive, and other payments may have to be made to them. It seems to me that each payment of these annuities was a debt of the testator, and a debt payable by his estate. It ought to be paid first out of his personal estate, but, his personal estate being insufficient, the deficiency must be borne by the three real estates which he has left, and, there being nothing to throw the burthen upon one of those estates rather than upon another, all of them being equally real estate of the testator, the three estates must contribute towards payment of the annuities rateably, according to their respective values. That, of course, does not bind the annuitant; he is entitled to be paid out of the real estate of the testator—not out of the capital or the income, but out of the estate. Probably he would have to resort to the capital if he had to take legal proceedings, because, though he might possibly ask for a receiver of the rents, he would not be likely to get a receiver appointed against the tenant for life, unless he were also taking steps to realize the capital. But his legal claim is against the whole estate, not distinguishing between capital and income.

In what proportions, then, are the persons who are interested in the estate, as tenants for life and remaindermen respectively, to pay? The principle to be applied will be the same *quâ* each tenant for life as if there were only one tenant for life of the whole estate, and it will be more simple to state it with reference to such a case. The tenant for life is entitled to the income of the estate for his life, and, so long as there is nothing to intercept it, it ought to be paid to him. But at the end of a year a payment of the annuity will become due. It will become payable to the annuitant out of the estate. If the rights of the parties were worked out strictly it might be necessary to sell a sufficient part of the estate, and to apply the proceeds in paying the annuity, leaving the estate diminished by the part thus sold, and the tenant for life in receipt for the future of the income of the diminished estate. The same thing in principle would have to be done at the end of each year, so long as the annuitant was living to receive his annuity. But I do not think the tenant for life is entitled to have the estate sold bit by bit in that way. I think, however, that he would, if he paid the annuity, be entitled to stand in the place of the person whom he paid as against the estate, and to have a charge upon the estate in respect of the sums which he so paid. Therefore, for the first year after the testator's death (assuming, for convenience, that the annuity is under the deed payable at the end of each year), the tenant for life would receive the whole income of the estate (I am assuming that all the other debts of the testator and his testamentary expenses have been provided for out of his personal estate); at the end of that year £700 would have to be provided for paying the annuitant, and the tenant for life would pay it, and he would then be entitled to stand in the place of the annuitant. He would have a charge upon the estate in respect of the sum which he had thus paid. As tenant for life he would still be entitled to receive the whole income of the estate, but as tenant for life he would have to pay out of the income to himself as incumbrancer interest upon the sum which he had thus provided. In other words, he would pay the £700, which would then become a charge upon the estate, but he during his life would have to keep down the interest upon it. At the end of the second year the same thing would be done again, and the charge of £700 would become a charge of £1400. The tenant for life would have a charge for £1400, and at the end of the next year he would have paid two years' interest on half of it, and one year's interest on the other half, and so on, so long as the annuity lasted. That, as it seems to me, is the principle on which the matter should be worked out. The decision in *Allhusen* v. *Whittell* (1) does not furnish me with much assistance in the present case, for it was based on the principle that the tenant for life of the residue of a testator's estate is not tenant for life of the whole estate, but of the whole estate *minus* something, and that something must be ascertained before it can be said of what he is tenant for life. He is not tenant for life of the whole estate, and he is not entitled to receive the whole income, and the rule in *Allhusen* v. *Whittell* was adopted as a convenient and fair rule—for ascertaining the share of the estate which really represented residue, and of which the tenant for life was entitled to receive income, as distinguished from the entire estate. That rule, in my opinion, does not apply to a case like the present.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Freer, Blunt & Co., Leicester; Robinson, Preston, & Stow*, agents for *Berridge & Miles, Leicester.*

W. L. C.

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(1) Law Rep. 4 Eq. 295.

NORTH, J.
1889
Oct. 29, 30.

CHRISTIE *v.* NORTHERN COUNTIES PERMANENT BENEFIT BUILDING SOCIETY.

[1889 C. 1318.]

Building Society—Arbitration—Dispute between Society and withdrawing Member—Appointment of Arbitrators after Action commenced.

The rules of a building society provided that every dispute between the society and any member, on which the decision of the board should not be deemed satisfactory, should be settled by a reference to arbitration, pursuant to the *Building Societies Act*, 1874, and that five arbitrators should be elected by the members at a general meeting, and in case of dispute the names of the arbitrators should be written on pieces of paper, and placed in a box, and the three whose names were first drawn out by the complaining party should be the arbitrators to decide the matter in dispute.

A dispute arose between an investing member and the society as to the amount which he was entitled to receive on withdrawal, and ultimately he brought an action against the society to enforce his claim. Up to this time no arbitrators had been elected under the rules. After the service of the writ a general meeting of the members was held, and five persons were elected as arbitrators.

Upon a summons by the society to stay further proceedings in the action, and that the dispute might be referred to arbitration in pursuance of the rules:—

Held, that the rule contemplated the appointment of a standing body of arbitrators, out of whom three were to be chosen by lot to decide any particular dispute, and that the society could not, after a litigation had commenced to which they were parties, select the tribunal to decide it.

The summons was, therefore, dismissed with costs.

SUMMONS by the Defendant society to stay all further proceedings in the action, and that the action and all matters in dispute between the Plaintiff and the society might be referred to arbitration pursuant to the rules of the society.

The society was registered under the Act 6 & 7 Wm. 4, c. 32, on the 24th of September, 1866. The rules contained the following provisions:—

Rule 70: "Any member who may be desirous of withdrawing invested shares shall at any time be entitled to receive back the net amount of his subscriptions, as soon as there are funds available, with such interest as the committee may determine.

If more than one shall give notice to withdraw, the committee shall order such withdrawals to be paid in rotation, according to the priority of the notices; provided always, that the widows and children of deceased members shall have preference. But in all cases a proportionate share of the expenses, if required, shall be first deducted. Any person who shall give notice to withdraw his invested shares shall thereupon cease to be a member of this society (in respect of the shares withdrawn), and forfeit all interest therein."

Rule 76: "It shall be lawful to repeal or make any alteration or amendment of these rules in the manner directed by 10 Geo. 4, c. 56, s. 9, as under."

Rule 77: "In case the committee for the time being shall be unable to determine any matter of dispute or difference which shall arise between the society, or the trustees or officers thereof, or any person acting under them, and any member or members thereof, or any person or persons legally claiming on behalf of any member or members thereof, respecting the construction of these rules, or any clause therein, or any bye-laws, additions, alterations, or amendments thereof; or respecting any other matter, cause or thing whatsoever, whether financial, personal, clerical, matters of fact, casualties, or fines or allowances, or otherwise, reference shall be made to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27. At the first meeting of this society, after the enrolment of its rules, five arbitrators shall be named and elected, none of whom being directly or indirectly beneficially interested in the funds of the society. In each case of dispute, the names of the arbitrators shall be written on pieces of paper, and placed in a box or glass, and the three whose names are first drawn by the complaining party shall be the arbitrators to decide the matter in dispute."

Rule 78: "Every member, or any person claiming under a member, whether he shall have executed a mortgage to the society or not, shall be bound by and subject to these rules, and by alterations and amendments thereof."

The Plaintiff became an investing member in respect of thirty £10 shares and part of another share, and upon these shares he paid subscriptions amounting in the whole to £303. On the

1st of April, 1887, he gave notice to withdraw all his shares. On the 24th of June, 1887, the society was registered under the *Building Societies Act*, 1874. On the 19th of January, 1888, a special general meeting of the members was held at which it was resolved to rescind rule 70, and substitute a different rule for it. At another meeting on the 3rd of February, 1888, it was resolved to rescind all the then existing rules, and to substitute for them an entirely new set of rules.

The new rules contained the following provisions:—

Rule 15 (6). "In the event of any loss occurring to the society on any mortgage, or any expense or loss whatever, or in the event of there being any apprehended loss or expense, the same shall be charged upon and divided amongst all the ordinary invested shares then in the society, in proportion to the amount of subscriptions on each share, including arrears."

(7). "All ordinary invested shares that may be withdrawn shall have deducted from them a fair proportion of such loss or apprehended loss, and the board may estimate from time to time the amount of such loss or apprehended loss, and thereupon make such deduction or charge as aforesaid."

(9). "A member who has given notice to withdraw his shares, shall continue to be a member, but shall not be entitled to vote at, or take part in, any meeting of the society, and he shall not by reason or in consequence of such notice, or otherwise, cease to be a member of the society, but shall continue to be bound by these rules, and by all alterations and amendments thereof, until he shall have received the amount payable in respect of his shares."

Rule 32 (1). "Every dispute between the society or the board, and any member or person claiming by or through any member, or under the rules, on which the decision of the board shall not be deemed satisfactory, shall be settled by reference to arbitration, pursuant to the *Building Societies Act*, 1874. Five arbitrators shall be elected by the members at a general meeting, none of them being directly or indirectly beneficially interested in the funds of the society. In each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn out by the complaining party shall be the arbitrators to decide the matter in dispute."

The society claimed under these new rules to make deductions from the amount of the subscriptions paid by the Plaintiff, and to pay him on withdrawal only £196 19*s.* 6*d.* instead of £303. The Plaintiff insisted that he was entitled to receive £303, and that the new rules did not bind him, and ultimately, on the 18th of April, 1889, he served the writ in this action on the society to enforce his claim. Up to this time no arbitrators had ever been elected by the members either under the old or under the new rules. On the 1st of May, 1889, notice was given of a special general meeting of the members to be held on the 7th of May for the purpose of electing arbitrators under rule 32 of the new rules. Notice was sent to the Plaintiff. The meeting was held on the 7th of May, and five arbitrators were elected. On the 8th of May, 1889, the present summons was issued.

Sir *H. Davey*, Q.C., *Everitt*, Q.C., and *Farwell*, for the society, contended that the Plaintiff was bound by the alterations in the rules, notwithstanding the fact that they were made after he had given his notice of withdrawal.

[The arguments on this point are not given in detail, because the Court did not decide it.]

The new rule as to arbitration applies.

Napier Higgins, Q.C., and *Rutherford*, for the Plaintiff:—

The Plaintiff is not bound by the new rules. And if he is, still the society cannot, after an action has been brought against them, oust the jurisdiction of the Court by electing arbitrators *ad hoc.* The old rule as to arbitration could not apply, because no appointment of arbitrators was made at the time mentioned in the rule, and at any rate an appointment could not be made under it after the old rules had been repealed. *Walker* v. *General Mutual Building Society* (1), in which it was held that a member who had given notice to withdraw was within a rule which provided that matters in dispute between the society and any member should be referred to arbitration, does not apply,

(1) 36 Ch. D. 777.

because here the tribunal was appointed after the litigation had commenced.

Everitt, in reply, was called upon only as to the right of the society to bind the Plaintiff by an appointment of arbitrators made after the action had been brought:—

The rule enables the society to appoint arbitrators at any time, provided that they act *bonâ fide* and do not choose persons who are interested directly or indirectly in the matter in dispute. The evidence shews that the persons who have been appointed have no interest. When once elected, the arbitrators remain in office; they are not really elected *ad hoc.*

North, J. (after stating the nature of the dispute and the provisions of the original rules of the society, continued):—

Rule 77 seems to me to provide for the determination of such a dispute as that which has arisen between the Plaintiff and the society, viz. whether he is entitled to receive back the whole of his subscriptions, or whether any, and, if any, what, deductions are to be made from them. I think, also, that the question is clearly one which the committee is unable to determine, because the matter has been put in the hands of the solicitors; a discussion has taken place about it, and it is because the committee could not determine it that recourse has been had to litigation, and the only question is, whether the dispute ought to be settled by an action in this Court, or by a reference to arbitration. The rule provides that five arbitrators are to be elected at the first meeting of the society after the enrolment of its rules. I have already during the argument intimated an opinion that that provision is merely directory and not compulsory, and that, if for any reason it happened that the arbitrators could not be appointed at the first meeting, an appointment at a second, and perhaps at a third meeting, would not necessarily be bad. But the rule is very important, as shewing that that which is contemplated is, that a standing body of arbitrators shall be elected as soon as possible, before any of the questions to be referred to them should have arisen, and it is out of that standing body, so elected before any question had arisen, that three arbitrators are to be chosen by lot to decide any dispute when it actually has arisen. Under that rule no arbitrators were ever appointed, and, at the time when the Plaintiff gave his notice to withdraw, on the 1st of April, 1887, there was no tribunal constituted under the rules to which any dispute could possibly be referred, because the society had allowed nearly twenty-one years to elapse without complying with that requirement of the rules. On the 24th of June, 1887, the society proceeded to incorporate themselves by registering under the Act of 1874, as they had a perfect right to do; and the Plaintiff, acting upon that, has issued his writ against the society as Defendants. It was suggested that by suing them in that way he had estopped himself from raising any objection to their having all the rights which a body incorporated under that Act might have. I do not see that he has done anything of the kind. He has recognised the fact, to which he could not shut his eyes, viz. that the society—the persons against whom he asserted a claim—had become an incorporated body. Before they were incorporated they could only be sued in the names of the trustees. But, so soon as the society, which is the same body of persons which was formerly unincorporated, became by virtue of the registration capable of being sued itself, it was perfectly competent to the Plaintiff so to sue them, and, in my opinion, he is in no worse position in so suing them than if they had remained unincorporated, and he had sued the trustees.

[His Lordship then read rules 15 and 32 of the new rules, and continued:—] The first question raised with regard to these rules is the important one, whether they bind the Plaintiff, who had under the old rules ceased to be a member of the society by giving his notice to withdraw before the incorporation of the society and before the new rules were passed. That point I do not think it necessary to decide on the present occasion, and I do not intend to decide it. I am not satisfied that the new rules are binding on the Plaintiff. I may put this by way of illustration. Suppose the original rules had provided that all disputes should be referred to the decision of two arbitrators, one to be nominated by the person who had the dispute with the society and the other by the society, and that the two arbitrators might appoint an umpire. If after a member had given notice to withdraw, a question had arisen as to what was due to him from the society, would it be open to the society to proceed to repeal the rule which I have supposed to exist, and to substitute for it a new rule that any dispute should be decided by a person to be nominated solely by themselves? It would take a great deal of argument to convince me that anything in the rules would authorize them to make such an alteration as that, directly affecting a person who had ceased to be a member.

I put this case to shew the difficulty which I feel, but, as I have just said, I express no opinion on the point. I will assume, for the purpose of my present decision, that the new rules bind the Plaintiff. But still, in my opinion, he is not bound to submit to arbitration, and for this reason. The old rules, as I have pointed out, required that there should be standing arbitrators appointed from the first. In the new rule as to arbitration there is an alteration of the language. It does not say when the arbitrators are to be appointed. All it says is, that "five arbitrators shall be elected by the members at a general meeting." But it goes on to give directions as to what is to be done in each case of dispute, namely, that, out of a body of arbitrators who are supposed to be then existing—a standing body of arbitrators—three are to be selected by lot. This is based on the assumption that the society have already done their duty by electing five good and competent arbitrators for the general purpose of arbitration, and then the bargain is that three persons chosen by lot out of the five shall decide the dispute. It is quite a different thing to say that any dispute is to be referred to the decision of a tribunal such as that to which I am now asked to send this dispute. No arbitrators had been appointed under the original rules, and no arbitrators had been appointed under the new rules down to the time when this dispute arose. It was found that the board could not settle it, and the parties must settle it in some legal way, and, there being no other course open to the Plaintiff, he issued his writ in the action. At the time when the writ was issued the dispute could not be settled by arbitration, because there were no arbitrators to whom it could be referred, and it is impossible for me to say that it was not open to the Plaintiff to issue a writ, for, if that were so, the omission of the society to appoint arbitrators would deprive him of any remedy at all. In my opinion, therefore, the Plaintiff was perfectly justified in commencing his action.

Then, after the writ had been served, the society proceeded to elect arbitrators by calling a general meeting of the members, at which five persons were elected. They are said to be perfectly competent and trustworthy persons, and I have not the slighest reason to doubt it. But still I do not consider that they constitute a tribunal such as is contemplated by the rule. That tribunal is to be a standing body of arbitrators, out of whom, when a dispute arises, three are to be chosen by lot. But what has really happened is this: no arbitrators to whom the matter could be referred having been elected until after the action had been commenced, the society—the Defendants to the action—proceeded to nominate the judges who were to decide the action, and they ask me to say that the judges so nominated are the only persons who can deal with the matter. I do not doubt that they have been properly elected, or that they are a good body of arbitrators, perfectly competent to deal with any dispute which may hereafter arise. But, in my opinion, the tribunal contemplated by the rule to decide a dispute between a member and the society is to consist of three persons to be elected by lot out of the standing body of arbitrators at the time, and it is not open to the society, after the dispute has arisen, to proceed to nominate the persons three of whom are to be the judges of the dispute. It is quite true that these gentlemen were appointed at a general meeting, but it was a general meeting of the members of the society, who are the Defendants. The general meeting would in all probability adopt the persons whose names were submitted to it, and those persons would have been nominated by somebody. It is sufficient to prevent my sending the matter to such a tribunal that these gentlemen may have been nominated by the committee or the directors, or some of them, expressly because they, or some or one of them, are or is known to hold a particular view on this subject. Honest and impartial men I do not doubt they are, but still they may have been selected because of their known views on this subject. I am not making the slightest imputation on the persons who selected

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these arbitrators, but, in my opinion, the tribunal to which a dispute of this sort is to be left is not one to be chosen by lot out of a body of persons elected by one of the parties to the dispute after the dispute has arisen.

I think, therefore, that this action, having been properly commenced, cannot be put an end to by referring the dispute to arbitrators thus elected. I must therefore dismiss the summons. The costs of the Plaintiff will be his in any event.

Solicitors for Plaintiffs: *Rowcliffes, Rawle, & Co.,* agents for *Bremner & Sons, Liverpool.*

Solicitors for Society: *Norris, Allens, & Chapman,* agents for *J. L. Johnson, Liverpool.*

W. L. C.

NORTH, J.
1889
Oct. 30.

In re BARRETT.
WHITAKER *v.* BARRETT.

[1887 B. 5220.]

Rules of Supreme Court, 1883, *Order xv., r.* 1—*Administration—Account—Executor—Retainer.*

An order in an administration action under Order xv., rule 1, merely for an account by an executrix and reserving further consideration does not affect the right of creditors to sue her, or her right to prefer creditors. Therefore where an executrix who, after such an order had been made against her, was appointed trustee of a settlement, and entitled as such trustee to a debt due from her testator's estate:—

Held that she might apply the balance of the testator's estate in part satisfaction of such debt, though other debts were unpaid.

THE Plaintiffs to this action were creditors of *John Reginald Barrett,* deceased. The Defendant was his widow, sued as his executrix. The writ was indorsed with a claim for administration of the real and personal estate of the deceased, and to have an account taken and a receiver appointed. No statement of claim was delivered. On the application of the Plaintiffs, under Order xv., rule 1, of the Rules of the Supreme Court, 1883, an order, dated the 20th of February, 1888, was made for accounts of the testator's personal estate not specifically bequeathed come to the hands of the executrix, or to the hands of any other person or persons by her order or for her use, and of the testator's debts, and the Judge not requiring any trial other than that application, further consideration was reserved.

The Defendant brought in an account of receipts and payments, from which it appeared that she had received £4370 3*s.* 8*d.*; that she had paid £1736 5*s.*, and retained the balance, £2633 18*s.* 8*d.*, on account of £4000 due under her marriage settlement, dated the 3rd of September, 1884. Besides the Plaintiffs' debt there were a number of other unpaid debts due from the testator's estate.

This was a summons to determine whether the Defendant was entitled to retain the £2633 18*s.* 8*d.*

The settlement mentioned above was a tripartite ante-nuptial settlement between the testator, the Defendant (then *Mary Ann Gale*), and *George John Tucker*. The testator thereby covenanted to pay to *George John Tucker* a sum of £4000 within twelve months of the solemnization of the intended marriage (which took place on the 27th of September, 1884), upon trust to invest the same and pay the income to the testator and the Defendant during their joint lives, and after the death of either of them to the survivor, and after the death of the survivor, subject to trusts for the children of the marriage, to hold the capital for the testator absolutely. There never was any child of the marriage. Another settlement of even date was executed between the same parties by which the testator covenanted to pay to *George John Tucker* within three years of the marriage a sum of £300 to be held on trust for the Defendant for life, and (subject to trusts for the children of the marriage) after her death for the testator absolutely. Neither of the sums of £4000 or £300 were paid by the testator to the trustee *George John Tucker*. Subsequently to the order for accounts made in the action, namely, on the 16th of March, 1889, by an indenture made between the Defendant of the first part, *George John Tucker* of the second part, and the Defendant of the third part, the Defendant was appointed trustee of both indentures of settlement in lieu of *George John Tucker*.

Frederic Thompson for the Plaintiffs:—

The executrix's right to prefer one creditor to another is stopped by the order for account, which is a form of order introduced in favour of creditors and others to save the expenses of administration where necessary. The creditor obtaining such an order instead of full administration will not be prejudiced by the fact that he did not proceed in the more expensive way. Even under the old practice the effect of an order for an account was to fix the rights: *Jones* v. *Jukes* (1). The right set up is called a right of executors' retainer. That was originally a common law right limited to a strictly legal debt, and was extended afterwards to certain equitable debts. But an executor has never been allowed to get in a debt to someone else and retain the amount of that: *Cockroft* v. *Black* (2); *Loane* v. *Casey* (3); *In re Compton* (4).

[NORTH J.:—*Jones* v. *Evans* (5) seems an authority in your favour on this point.]

The set-off clause of the *Bankruptcy Act* is, I admit, introduced into the administration of insolvent estates in this Court, but there can be no set-off under the *Bankruptcy Act* in respect of a debt due to a debtor in a different capacity from that in respect of which he is debtor.

Cozens-Hardy, Q.C., and *Ribton*, for the Defendant:—

As to set-off. The executrix no doubt cannot set off in respect to the debt due to her as trustee. She has, however, a life interest, which under the *Bankruptcy Act* could be valued and proved for, and there could be a set-off in respect of the amount it was valued at; it follows, inasmuch as the rules as to proof and set-off in bankruptcy are now applicable to the administration of insolvent estates in this Court, that the executrix can set off the value of her life interest against the assets in her hands.

It also follows that she could exercise a right of retainer to the extent of the value of her life interest if an administration decree had been made: *Eberle's Hotels Company* v. *Jonas* (6).

But her case stands on a higher footing, for a mere order for accounts has no effect on the mutual rights of creditors, or the power and duty of executors to continue the administration in

(1) 2 Ves. 518.
(2) 2 P. Wms. 298.
(3) 2 W. Bl. 965.
(4) 30 Ch. D. 15.
(5) 2 Ch. D. 420.
(6) 18 Q. B. D. 459.

due course. It would afford no protection to an executor in an action by a creditor, and will not interfere with his paying a creditor under threat of proceedings or otherwise; that is the logical view, and it seems to have been entertained by Mr. Justice *Pearson* in *Mills* v. *Mills* (1).

Had the order not been made (it will not be disputed) the Defendant could have preferred particular creditors: *Marriott* v. *Thompson* (2). The fact that an order for accounts under Order XV., rule 1, has no effect on the process of administration, and does not affect the right of the parties, is recognised in the new rule, Order LV., rule 10A (*b*), which provides for making an order for administration not to be proceeded with: that rule would have been useless if Order XV., rule 1, had the same effect.

F. Thompson, in reply.

NORTH, J.:—

It is said that the widow had a right to retain the whole sum, because she could have given a receipt for the debt. I do not think she could have given such receipt as tenant for life, for, subject to her life interest it belonged to her husband's estate. Nor as executrix could she have given a receipt for it, because it belonged to the trust. If she had chosen to give up her life interest, as executrix she would have been able to give a receipt, for the whole fund would have belonged to her husband's estate in equity. She would not do that, for this very good reason, that she would be depriving herself of the very right she is now claiming. And it seems to me she had no right to receive the money, though she occupied both characters. She cannot combine those characters in such a way as to enable her to pass over the interest of the trustee.

The next point is different. At the death of her husband she was not entitled to anything except her life interest. Since that time a deed has been executed by which she became the trustee, and entitled to receive the whole fund due from her husband's estate under the settlements. That was done subsequently to the order to account; before that order was made she clearly

(1) W. N. 1884, p. 21.

(2) Willes, 186.

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could have paid the trustee the whole of the assets, for she would have had a right to prefer one creditor to another. Did the making of that order make any difference? I do not think it did: for I find no decree for administration. If there had been such a decree, it would have put an end to her power of preference. But in my opinion the order made has no such effect. In the case cited, *Jones* v. *Jukes* (1), no doubt the Lord Chancellor did say: "The administratrix cannot be allowed payments made after a decree to account." And it is said there is here a decree for an account. In the first place, I do not think that a decree has been made in this action at all. Again, the decree made in *Jones* v. *Jukes* was not merely a decree for an account, for such a decree was not known. The decree is stated to have been a decree directing the usual accounts and a distribution. This certainly could not have been less than a decree for accounts followed by a direction (and this is important) that the assets should be applied in due course of administration. In the present case there is nothing of the sort. An order has been made in a form which the Legislature has authorized, for the purpose of securing advantages in the saving of expense and otherwise; but it is a different form from the usual judgment or order for administration. This view of the case is borne out by the rule referred to by Mr. *Hardy*, Order LV., rule 10A (*b*). That rule recognises the fact that unless there is the usual order for administration there may be such difficulties as the present in the way of plaintiffs, and the other creditors will not be prevented from suing, and executors will not be prevented from paying away assets. This is a case in which before the order was made the widow could have paid the trustees, and the making the order in this form was not sufficient to prevent her. If that order did not prevent her, nothing that has happened since does so. Then it is said this is not a question of preferring, but of retaining: that what she says is that since the date of the order a deed has been executed by which she became a trustee, and is entitled to pay herself, or, in other words, to retain what assets are in her hands. I think she is paying herself in a different character, and the act is more properly called payment than retainer. By whatever name it is called it is the same thing. She could have paid the trustee, and I do not think the right to apply the money for the purposes of the trust is lost by the execution of the deed appointing her trustee.

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(1) 2 Ves. 518.

Solicitors for Plaintiffs: *Kemble & Co.*
Solicitors for Defendant: *Agate & Garnett.*

D. P.

NORTH, J.
1889
Oct. 31.

In re BLACKBURN.
SMILES *v.* BLACKBURN.

[1889 B. 2575.]

Will—Construction—Codicil—"Confirmation"—Execution of Special Power.

An ante-nuptial settlement of personal estate gave the survivor of husband and wife (in the events which happened), "after the decease of the other of them," a testamentary power of appointment among their children. During the life of the wife the husband made a will containing a residuary devise and bequest in favour of his children of all property he "might be possessed of or over which he might have power of bequest or disposal" at the time of his death. After the death of his wife the husband made a codicil confirming his will:—

Held, that though he could not execute the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will, and the power had been duly executed.

THIS was an originating summons taken out by the trustees of two indentures of settlement to determine whether the will and codicils of *Joshua Blackburn*, who died in October, 1888, operated as an execution of powers of appointment in favour of his children comprised in this settlement. The Defendants to the summons were the testator's eldest son, *Joshua John Blades Blackburn*, his only other son, *Henry Robson Blackburn*, and his three daughters.

On the 4th of February, 1853, a settlement of personal property, the first settlement in question, was executed in contemplation of the marriage, which shortly afterwards took place, between the testator, *Joshua Blackburn*, and *Mary Ann Smiles*. It was thereby declared that after the death of the survivor of the husband and wife the funds subject to the settlement should be held on trust for the children of the marriage, as the husband

and wife during their joint lives should by deed or instrument in writing appoint, and in default of such joint appointment, "and for want of such joint direction or appointment, or so far as any such direction or appointment shall not extend, then as the survivor of them, the said *Joshua Blackburn* and *Mary Ann Smiles*, at any time or times, by any deed or deeds, with or without power of revocation and new appointment, to be sealed and delivered by him or her in the presence of and to be attested by two or more witnesses, or by his or her last will and testament in writing, and as to the said *Mary Ann Smiles* whether covert or sole, shall alone after the decease of the other of them so dying direct or appoint."

The testator made a will dated the 11th of August, 1854, by which he gave, devised and bequeathed to his trustees and executors all his real and personal estate whatsoever and wheresoever situate, "that is to say, in trust for the following intents and purposes after payment of any just debts, funeral and other expenses." After provisions in favour of his wife and eldest son, *Joshua John Blades Blackburn*, the will proceeded: "And my will further is that any other estate or property whatsoever, real or personal (except any specific legacies which may be contained in this my will or any codicil thereto), of which I may be possessed at the time of my decease, or over which I may have the power of bequest or disposal, shall be held in trust for the benefit of" his younger children. The will contained the following clause: "My desire is that during the minority of any child or children my trustees shall pay to my dear wife, should she be living, one-half the interest, rents or annual profits of such estates, funds and securities as such child or children may be entitled to under this my will for the maintenance and education of such child or children."

On the 15th of August, 1854, an indenture of settlement, indorsed on the ante-nuptial settlement (being the second settlement in question) was executed between the testator and his wife of one part, and the trustees of the first settlement of the other part, by which personal estate was settled, by reference to the ante-nuptial settlement, on trusts similar to those declared therein, including the power of appointment.

The testator's wife died in May, 1882.

The testator made a codicil to his will dated the 10th of July, 1882, by which he bequeathed a sum of stock and a leasehold house to his three daughters; he bequeathed also to them the furniture and effects at the house with the exception of enumerated articles; he gave these articles and the residue of his real and personal estate to his second son, *Henry Robson Blackburn*, absolutely. After directions as to the legacies to his daughters, and the appointment of guardians, the codicil concluded as follows: "In all other respects I confirm my original will in so far as it is still capable of taking effect." The testator made a second codicil, also dated the 10th of July, 1882, by which he referred to the will and the first codicil and appointed a third executor. The codicil concluded with the words, "I confirm my said will and codicil."

William Druce, for the trustees of the settlements.

Warrington, for the eldest son:—

The will does not in terms or by implication from the language used exercise either power. There are various provisions such as the maintenance clause not applicable to the settled funds: *In re Cotton* (1).

Supposing the words of the will were such that they would have operated as an execution of a power the testator had when he made his will. The power in the first settlement was not in existence when the testator made his will, it was not in existence till the testator became the survivor by the very terms of the settlement. It was not therefore executed by his will: *Cave* v. *Cave* (2); *à fortiori*, he did not exercise a similar power contained in an instrument itself non-existent.

Then it may be said that the effect of the first codicil is to re-enact the will; that is not so, the codicil merely confirms it so far as it is capable of taking effect; that does not extend the will or bring anything into the will which would not otherwise have been within it: *Hope* v. *Hope* (3); *Holmes* v. *Coghill* (4), and the second codicil merely confirms without extending the disposition made by the will and first codicil together.

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(1) 40 Ch. D. 41.

(2) 8 D. M. & G. 131.

(3) 5 Giff. 13.

(4) 7 Ves. 498.

Swinfen Eady, for the younger children:—

The first codicil confirms the will, that has the same effect as if the very words of the will were repeated in it. The case of *Hope* v. *Hope* (1) is no authority to the contrary; the real point of that case was that the words of the will were too vague in themselves to operate as an exercise of the power in question.

Warrington, in reply.

NORTH, J.:—

I think it clear in this case that the powers were well executed by the first codicil. I concur in the observations of Lord Justice *Knight Bruce* in *Cave* v. *Cave* (2). Inasmuch as the power in the first settlement was only a power in the survivor alone "after the decease of the other of them"—and when the testator executed his will they were both alive—I think it quite clear that the making this will was not an exercise of the power in the settlement which had already been made, and it follows it could not be an exercise of the power in the settlement that had not itself been made.

But I think the codicil had the effect of repeating the will, and making it as good and effectual as if it had been executed for the first time after the death of the wife. In other words, the codicil has the same effect as if the very words of the will were repeated in it. It is important to bear in mind that this is not a case in which the will professed to be exercising the particular power *nominatim*, but the testator was exercising every power which he should be possessed of at the time of his death. In the case of *Hope* v. *Hope*, relied upon by Mr. *Warrington*, that intention failed in consequence of that part of the will not being precise and definite. The effect of the codicil as matter of construction is by relation to the words of the will to express an intention to execute every power the testator had at his death. At the time of the execution of the codicil the powers in both settlements were capable of being executed, and in my opinion

(1) 5 Giff. 13.

(2) 8 D. M. & G. 131.

the effect is just as if in so many words the codicil had bequeathed and devised all his estate over which at the time of his death he might have the power of bequest or disposal. I come, therefore, to the conclusion that on the words of the will incorporated into the codicil, the powers were well executed.

But then it is said that the other parts of the will are inconsistent with this construction, and on this part of the argument my decision in *In re Cotton* (1) is relied on. That case stands on an entirely different footing; there were provisions in the will in that case as to payment of debts and otherwise (especially a direction as to maintenance) that precluded me from finding sufficient indication of intention to exercise the power. With regard to the provision for maintenance contained in the will in this case the direction that the trustees are to make certain payments to the wife out of income can only refer to payments out of the testator's own property: for under the settlements the lady was entitled herself to the whole income. I do not think that the direction as to maintenance in this will or any other part of the will is sufficient to prevent my coming to the conclusion that there was an intention to exercise such powers as are conferred by the settlements.

Solicitors for the trustees and younger children: *Druces & Attlee.*

Solicitor for the eldest son: *Pretor W. Chandler.*

(1) 40 Ch. D. 41.

D. P.

NORTH, J.

1889

Nov. 9.

In re DRUMMOND'S PATENT.

Patent—Petition for Revocation—Respondent domiciled and resident out of Jurisdiction—Service—Notice—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), s. 26—*Rules of Supreme Court,* 1883, *Order* XI., *r.* 1.

The sole Respondent to a petition for the revocation of a patent was a domiciled Scotchman, who was resident in *Scotland.* A copy of the petition and of the Petitioners' particulars of objection had been delivered to him personally in *Scotland,* and he had written to the Petitioners' solicitors saying that he did not intend to appear on the hearing of the petition, because he was not under the jurisdiction of the English Courts.

Upon an application by the Petitioners for directions as to the mode of trial:—

Held, that, though there had not been, and could not under the Rules of Court be, any service of the petition out of the jurisdiction, yet, as ample notice had been given to the Respondent, the Court could make an order *nisi,* that, unless the Respondent should, on or before a specified day, appear and shew cause to the contrary (in which case it would be open to him to dispute the jurisdiction), the petition should be tried with *vivâ voce* evidence, and be set down for trial in the list of witness actions.

PETITION for the revocation of a patent granted in 1886 to *W. H. Drummond.*

Drummond was a domiciled Scotchman, resident at *Dundee.* He had commenced an action against the Petitioners in *Scotland* for an alleged infringement of the patent. The Petitioners were resident and domiciled in *England.* They had no place of business in *Scotland,* but had an agent there for sale of their goods. The Petitioners alleged that the patent was invalid. There was evidence that a copy of the petition and of the Petitioners' particulars of objections had been personally delivered to *Drummond* at *Dundee,* and also that the Petitioners' solicitors had written a letter to him, informing him that on the hearing of the petition they should ask that it should be heard with witnesses *vivâ voce,* and (if necessary) transferred to the list of witness actions, and they requested him to give them the name of his solicitors. He replied, giving the name of his solicitors, but said that he did not intend to make any appearance on the petition, as he was not under the jurisdiction of the English Courts.

NORTH, J.
1889
In re DRUMMOND'S PATENT.

Moulton, Q.C., and *W. N. Lawson*, for the Petitioners, now asked for directions as to the mode of trial:—

The petition ought to be tried with *vivâ voce* evidence, and the most convenient course would be to set it down in the list of witness actions. According to the construction which the Court has put upon Order XI. of the Rules of the Supreme Court, 1883, there is no provision for the service of a petition out of the jurisdiction, and the *Patents Act* of 1883 contains no such provision. But a petition of this kind is not like a personal action in which service of the writ upon the defendant is necessary to found jurisdiction. It is more like an action *in rem*, and the jurisdiction attaches at once upon the presentation of the petition. The object is to obtain the revocation of a public grant. "Service," in the technical sense of the word, is not required. Of course, the Court will take care that no injustice is done, and will not proceed unless the Respondent has had full notice. The evidence shews that the present Respondent has had ample notice, and that he deliberately refuses to appear. Under the old procedure by *scire facias* for the revocation of patents it was not necessary to serve the defendant, though the Court would probably have set aside a judgment obtained by default, if the Defendant could shew that he had had no notice of the proceedings: *Hindmarch* on Patents (1). If it is impossible to proceed without technical service on the Respondent, the result will be that an invalid patent can never be revoked, if the owner of it chooses to remain out of the jurisdiction. English patents are frequently granted to foreigners resident abroad.

NORTH, J.:—

I will not, on hearing one side only, decide the question now raised: but I am prepared to make an order *nisi* that the petition be tried with *vivâ voce* evidence, and that it be placed in the list of witness actions, unless the Respondent on or before the 22nd instant appears and shews cause to the contrary. It will be open

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(1) Pages 391, 392.

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to him then to dispute the jurisdiction of the Court. I do not decide now that there is jurisdiction. Notice of my present order must be given to the Respondent at once.

NOTE.—The Reporter is informed by Counsel that the Respondent did not appear to shew cause within the time limited.

Solicitors: *J. H. Johnson, Son, & Ellis.*

W. L. C.

NORTH, J.
1889
Nov. 16.

WOOD *v.* GREGORY.

[1889 W. 1650.]

Practice—Partition Action—Request for Sale by Owners of Moiety—Proof of Title at Hearing—Inquiry in Chambers as to Persons interested.

As a general rule, when in a partition action a request for a sale is made at the trial by persons who allege that they are the owners of a moiety of the property, an inquiry will be directed in Chambers to ascertain the persons interested in the property.

But in simple cases, where the value of the property is small, the Court may at the trial order an immediate sale, upon being satisfied as to the persons interested.

In re Stedman (1) explained.

THIS was a partition action brought by the owners of one moiety of property against the owners of the other moiety. The Plaintiffs, by their statement of claim, asked for a sale. An affidavit was made that all the persons interested in the property were parties to the action. The value of the property was estimated at about £10,000.

H. M. Humphry, for the Plaintiffs:—

The affidavit may be accepted as proof that all persons interested are parties to the action, and an immediate order for sale may be made without directing an inquiry in Chambers as to the persons interested. This course was adopted by Mr. Justice *Kay* in *In re Stedman* (1).

W. Baker, for some of the Defendants.

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(1) W. N. 1888, p. 119.

Oswald, for the other Defendant.

H. Greenwood, amicus Curiæ, referred to *Willis* v. *Willis* (1), in which Mr. Justice *Chitty* adopted the same course as was adopted in *In re Stedman* (2).

NORTH, J.:—

I cannot accept *In re Stedman* as an authority that in all partition actions the title to the property is to be proved in Court, instead of directing an inquiry in Chambers. This may be a very proper course to adopt in simple cases, and especially when the value of the property is but small: and I have myself followed that course. But, looking at the nature of the property in the present case, and at the interests of the parties, which, as set forth in the statement of claim, appear to depend on a complicated pedigree, I think it will be more convenient that the ordinary inquiry should be made in Chambers. I will give leave to apply in Chambers for an order for sale.

Solicitors: *Torr & Co.; W. Montgomery White; Chester & Co.*

(1) 38 W. R. 7.

(2) W. N. 1888, p. 119.

W. L. C.

STIRLING, J.
1889
Aug. 6, 7, 9.

In re LORD STAMFORD'S SETTLED ESTATES.

[1884 S. 2597.]

Settlement of Lands—Different Estates—Same Tenant for Life—Application of Capital Moneys arising from one Estate for Improvements on another subject to the same Limitations—Interposition of Term of Years on one of the two Estates—Discretion of Tenant for Life—Costs of Surveyor and Solicitor of Tenant for Life—Settled Land Act 1882 (45 & 46 *Vict.* c 38), ss. 2, 5, 20, 21, 24, 26, 53.

The powers conferred by the *Settled Land Act*, 1882, upon a tenant for life are, pursuant to sect. 53, to be exercised with a due regard to the interests of all parties entitled under the settlement, and the discretion vested in him by the Act as to the application of capital moneys must not be so exercised as unduly to prejudice such parties, but where it is a matter of doubt, then the discretion of the tenant for life, if fairly exercised, ought to prevail.

Four estates, *A.*, *B.*, *C.* and *D.*, were devised by the same will in trust for the same tenant for life. After her death estates *A.*, *B.* and *C.* were devised to different persons in strict settlement, and a long term of years was created in estate *D.*, subject to which such estate was devised as to one moiety to the uses of estate *A.*, and as to the other moiety to the uses of estate *B.* The trusts of the term were for the payment off of the incumbrances on all four estates in the order in which they were devised.

Upon an application by the tenant for life:—

Held, that, notwithstanding the interposition of the term of years, estate *B.* and one moiety of estate *D.* constituted one settled estate within the meaning of the *Settled Land Act;* and that capital moneys arising from the moiety of estate *D.* were applicable for improvements on estate *B.*: it appearing that this application of the moneys, though it might delay, would not endanger the payment of the incumbrances on the other estates.

Held, also, that the costs as between solicitor and client of the solicitor and surveyor of the tenant for life for preparing and carrying out the necessary schemes for such improvements were costs incidental to the application and were payable out of the capital moneys arising from estate *B.* and the moiety of estate *D.*

The *Settled Land Act*, 1882, s. 5, s. 20, sub-s. 2, s. 21, sub-ss. 2, 5, and 10, s. 24, sub-ss. 2, 5, and s. 53, explained.

THIS was an adjourned summons raising the question whether capital moneys under the *Settled Land Act*, arising from the *Lancashire* estate settled by the will of *George Harry* the late Earl of *Stamford* and *Warrington*, could be applied for improvements on the *Leicestershire* estate settled by the same will.

The late Earl, who died on the 2nd of January, 1883, by his will, dated the 26th of June, 1875, devised four estates, viz., the *Staffordshire* estate, the *Leicestershire* estate, the *Lancashire* estate, and the *Cheshire* estate (which in the will were collectively alluded to as the *Shire* estates), subject to the mortgages, charges and other incumbrances affecting the same, to trustees during the life of his wife, the Countess of *Stamford* and *Warrington*, in trust for her separate use, but subject to the provisions as to management and as to the payment of the several yearly sums of £8000 and £12,000 in the will contained.

Subject to this disposition the testator devised the *Cheshire*, *Staffordshire*, and *Leicestershire* estates to different persons in strict settlement. With regard to the *Lancashire* estate the testator devised the same, after the expiration of the estate limited therein in trust for the benefit of his wife, to his trustees for the term of 1000 years, and from and after the expiration or sooner determination of the term of 1000 years, and in the meantime subject thereto and to the trusts thereof, the testator devised one moiety of the *Lancashire* estate to the uses and with and subject to the powers declared concerning the *Staffordshire* estate, and the other moiety to the uses and with and subject to the powers declared concerning the *Leicestershire* estate. The trusts of the term of 1000 years were, to apply the rents and profits of the *Lancashire* estate in aid of the testator's personal estate, in the first place towards the discharge and satisfaction of his funeral and testamentary expenses, and debts, and the legacies and annuities given by his will, and in the next place towards the discharge and satisfaction of the mortgage debts and other gross sums charged upon the four *Shire* estates, or any or either of them, at the time of his decease, and for the time being unpaid; and the testator directed that these rents and profits should in the first place be applied in or towards the discharge and satisfaction of the mortgage debts and other gross sums charged upon the *Staffordshire* estate; and, in the second place, in discharge and satisfaction of the mortgage debts on the *Leicestershire* estate; and in the next place towards the discharge and satisfaction of the mortgage debts and other gross sums charged on the *Cheshire* estate, and, lastly, when all the last

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mentioned mortgage debts and gross sums charged upon those three estates had been fully paid and satisfied, in satisfaction of the mortgage debts and gross sums charged on the *Lancashire* estate. The testator also directed that when all his funeral and testamentary expenses, debts, legacies, annuities, and gross sums, should have been fully discharged and satisfied, the term of 1000 years should cease and determine; and declared that the subsistence of the term should not prevent the trustees from selling or disposing of the *Lancashire* estate for any purpose for which such sale or disposition was authorized by his will, and that such sale or disposition, unless expressly made subject to the term, should have priority over it. The will also contained a power for the trustees at any time or times in their discretion "to apportion the *Lancashire* estate or any part thereof among the persons entitled thereto, and for that purpose by any deed or deeds to revoke and appoint uses of any hereditaments, and to make any provision for equality of partition by charge upon or mortgage of any allotment or allotments, which mortgage or mortgages may contain such power or powers of sale and such other powers and provisions as my trustees or trustee may deem expedient." The testator then, *inter alia*, conferred certain powers for the management of the settled estates during minorities, and during the life of his wife, and, as to the *Lancashire* estates, during the term of 1000 years; and the clauses relating to such management commenced as follows: "And I hereby declare my will to be as regards each settled estate (for facility of reference hereinafter the *Cheshire* estate being considered and treated as one 'settled estate,' the *Staffordshire* estate and a moiety of the *Lancashire* estate being considered and treated as one other 'settled estate,' and the *Leicestershire* estate and the other moiety of the *Lancashire* estate being considered and treated as the third 'settled estate')" . . . . The will also contained a power of sale and exchange, exercisable by the trustees, as to all the four *Shire* estates with certain consents, and as to the *Lancashire* estate, at the discretion of the trustees during the continuance of the term of 1000 years.

All these four estates were subject to charges of a considerable amount at the death of the late Earl, the *Leicestershire* estate in particular being mortgaged for a sum of £223,000. The rents and profits derived from the estates collectively were more than sufficient to keep down the interest on the mortgages. As to the *Lancashire* estate, which was of great value, there was a considerable surplus income, but the rents and profits of the *Leicestershire* estate, exclusively of the mansion-house called *Bradgate House*, were insufficient to pay the interest on the mortgages and other charges, and the costs of the management of the estate; and there was no capital money available for permanent improvements, which were urgently needed. There were, however, in the hands of the trustees capital moneys arising from the *Lancashire* estate available for permanent improvements not only on the *Lancashire* estate but on the *Leicestershire* estate also, and this summons was taken out by the Countess of *Stamford*, as tenant for life under the will of her late husband, in order to obtain a declaration of the Court which would authorize the trustees to apply the capital moneys arising from the *Lancashire* estate in improvements on the *Leicestershire* estate.

Hastings, Q.C., and *B. Fossett Lock*, for the Countess of *Stamford*, in support of the application:—

By sect. 2 of the *Settled Land Act* any will "by virtue of which any land or . . . interest in land stands for the time being limited to or in trust for any persons by way of succession creates or is . . . a settlement;" by sub-sect. 3 "land and any estate or interest therein, which is the subject of a settlement, is for the purposes of this Act settled land"; and by sub-sect 5, "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Here, by the will of the late Earl, four estates are grouped together in one devise, under which the Countess, his wife, was made tenant for life of the whole. This will, then, is one "settlement," and the whole four estates are settled lands to which a single tenant for life is entitled, with all the large powers attaching to an equitable tenant for life, including the power of sale. The fact that after the death of the Countess the limitations

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diverge does not prevent the lands from now being one settled estate, and there is nothing in the *Settled Land Act* to prevent the trustees from applying capital moneys arising from one portion of the settled estate in improvements on another portion. The Court has sanctioned the employment of moneys arising from the sale of heir-looms in paying off charges on real estate which might not devolve in the same manner, which is an analogous case: see *In re Duke of Marlborough's Settlement* (1); *Settled Land Act*, 1882, sects. 21, 22, and 25. But if the four estates cannot be considered as one settled estate, at all events the testator has made the *Leicestershire* estate and one moiety of the *Lancashire* estate into one settled estate, for the limitations affecting them are the same throughout, with the single exception that, after the death of the tenant for life, a term of 1000 years is created in the moiety of the *Lancashire* estates for the satisfaction of funeral and testamentary expenses, debts, legacies, and annuities, and then for payment of the mortgage debts on all the four estates in a particular order. But the fact that one portion of a settled estate is exempt from a charge to which the other portion is subject does not prevent the two portions from constituting one estate, or render it improper to apply capital moneys arising from the charged portions in improvements upon the uncharged portion. And, moreover, the testator has said that the *Leicestershire* estate and a moiety of the *Lancashire* estate are to be considered and treated as one settled estate. There is nothing in the Act which imposes any restriction in this respect, and why should the Court infer that there is no power to do this when the whole scope of the Act has been to give the widest powers and the largest discretion to the tenant for life?

Buckley, Q.C., and *Morshead*, for the trustees:—

The trustees are desirous of assisting the tenant for life, if a way can be found to do what is asked. But the question is not concluded by the consideration that there is here one instrument and one tenant for life. Upon the terms of the will there are here several separate settled estates, subject to the question whether the will does not make the *Leicestershire* estate and a moiety of the *Lancashire* estate one settled estate, and we submit that during the subsistence of the term of 1000 years they must be regarded as separate estates.

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(1) 30 Ch. D. 127.

The summons also asks the direction of the Court that the costs of and incidental to this application, including the costs of the tenant for life and her solicitor and surveyor in the preparation and carrying out of the necessary schemes, may be taxed as between solicitor and client, and paid by the trustees out of the property subject to the settlement. Under sect. 26, when a tenant for life desires that capital moneys should be applied in improvements, he submits a scheme to the Court or the trustees. Here it is proposed to submit a scheme to the trustees, and the employment of a surveyor is a necessary step towards the exercise of the power of laying out capital money in improvements, and his costs appear to fall within the words of sect. 21, sub-sect. 10, as costs of or "incidental to" the exercise of powers. The case of *In re Eyton's Settled Estate* (1), which seems somewhat opposed to this view, was an exceptional case, where the question arose as to the charges of the auctioneers for preparing an elaborate valuation report and survey of the estate under the instructions of the tenant for life.

[STIRLING, J.:—The surveyor's costs are certainly costs incidental to the exercise of the power. But they must, of course, be reasonable and ordinary costs, and you are not to get for the purpose of selling one farm the costs of an elaborate survey of the whole estate.]

Buckley, Q.C.:—

Then as to the costs of the solicitor of the tenant for life.

Hastings, Q.C.:—

That question was decided in *In re Llewellin* (2), where it was held that the tenant for life having defended an action which was dismissed with costs was entitled to be paid his extra costs of so much of the action as related to the exercise of the powers of the *Settled Land Act*, as costs incidental to the exercise of his powers under the Act.

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(1) W. N. 1888, p. 254.

(2) 37 Ch. D. 317.

[STIRLING, J.:—The words of the Act are not merely "costs, charges, and expenses of," but also "or incidental to," and I think it was intended to give to a tenant for life properly put to costs and charges in the course of the execution of the power something more than ordinary costs.]

Borthwick, for the infant tenant in tail of the *Staffordshire* estate:—

I admit that but for the interposition of the term of 1000 years upon the *Lancashire* estate, the *Leicestershire* estate and one moiety of the *Lancashire* estate would constitute one settled estate, but the term makes all the difference. There is no immediate limitation over of the *Lancashire* estate to any one after the limitation in favour of the Countess; but the *Lancashire* estate is divided for the benefit of all the other three estates, and the first trust of the term is to discharge the mortgages on the *Staffordshire* estate, which accordingly has a material interest in it. So long, therefore, as that term is in operation, the moiety of the *Lancashire* estate cannot be said to coalesce with the *Leicestershire* estate, so as to make the two form one settled estate. The same considerations apply to the *Cheshire* estate.

[STIRLING, J.:—If that be so, the two would never be the same settled estate, because, under the *Settled Land Act,* 1882, sect. 2, sub-sect. 4, the question whether land is settled is governed by the state of things at the death of the testator.]

They never will. If they could be held to be one estate, then under sect. 5 the tenant for life could upon a sale, with the consent of the incumbrancers, shift all the incumbrances from *Leicestershire* on to *Lancashire,* to the prejudice of the persons entitled to the *Staffordshire* estate, the incumbrances on whose estate are, according to the terms of the will, to be paid off in priority. Again, if the capital moneys arising from the moiety of the *Lancashire* estate are applicable for improvements on the *Leicestershire* estate, they are likewise applicable for all the other purposes under the Act: *Ex. gr.* for the purchase of land; and then another difficulty arises. Under sect. 24 purchased land is to be conveyed to the uses of the settlement, and you have here three sets of uses, and could not tell to which of them the land acquired should be conveyed. As to the contention that the testator has said in his will that these two are to be treated as one estate, that expression is used merely for "facility of reference."

Henry Fellows, for the tenant for life in remainder of the *Leicestershire* estate, supported the application.

Peck, for the tenant for life of the *Staffordshire* estate.

Hastings, in reply.

1889. Aug. 9. STIRLING, J. (stated the facts, and continued):—

The question which has arisen is this:—It appears that the *Leicestershire* estate is heavily burdened with mortgages, and there are no capital moneys arising from that estate which are available for the purpose of improvements on that estate, which improvements are urgently wanted. On the other hand, the *Lancashire* estate is a very valuable estate. It is less heavily burdened, and there are capital moneys arising from it which it is sought to apply in improvements on the *Leicestershire* estate. The way in which the case was put in the first instance was this: It was contended that as all the four estates were settled by the same instrument, and as there was the same tenant for life of them all, there was really only one settlement created by the will, and one settled estate. Now, as to that, I felt during the argument, and still feel, very great difficulty. It is not necessary, however, that I should come to a conclusion upon that, because the point was, I will not say abandoned, but at any rate not insisted upon; and ultimately the case was put in a different way. It was then said that the *Leicestershire* estate and one moiety of the *Lancashire* estate constituted but one settled estate. That is totally different from the case at first put with reference to the four estates. As regards the three estates, the *Cheshire* estate, the *Staffordshire* estate, and the *Leicestershire* estate, though they are all settled by the same instrument, and though there is the same tenant for life, in the first place, of them all, yet all the subsequent limitations are in substance different; whereas, as regards the *Leicestershire* estate and one undivided moiety of the *Lancashire* estate, the limitations are the same throughout, with this one exception, that upon the *Lancashire* estate there is created a term of 1000 years immediately after the death of the present tenant for life. Now, what are the purposes for which the term of 1000 years is created? It is for the satisfaction of funeral and testamentary expenses, debts, legacies, and annuities, and then for payment of the mortgage debts of all the four estates in a particular order. It seems to me, therefore, that in substance we have here a settlement of one estate consisting of the *Leicestershire* estate, and an undivided moiety of the *Lancashire* estate, but that the undivided moiety is subject to a charge from which the *Leicestershire* estate is exempt. The question which I have to consider, therefore, is whether, when a settled estate comprises land which is subject to a charge from which the rest of the settled estate is exempt, capital moneys arising from the lands which are subject to the charge, can be applied for the improvement of the portion of the settled estate which is not subject to the charge; which is a very different question from the one put forward in the first instance. Now, Mr. *Borthwick*, who appeared for the persons interested in the *Staffordshire* estate, and who argued it, if I may say so, extremely well on their behalf, called my attention to this, that if I come to the conclusion that the capital moneys arising from the moiety of the *Lancashire* estate are available for improvements of the *Leicestershire* estate I must also be prepared to say that they are applicable for any of the purposes to which capital moneys may be applied under the Act, and his argument was this, that as regards other applications, there were indications in the Act that that was not intended. In particular, he referred to the sections which deal with the application of the capital moneys in the purchase of lands to be settled to the same uses and to those which deal with the application of capital moneys for the payment off of incumbrances.

Now, I must see whether there is anything in the provisions of the Act relating to those applications, which prevents me from saying that money arising from the *Lancashire* estate, which is subject to the charge, can be applied for improvement or otherwise for the benefit of the *Leicestershire* estate, which is not.

First of all as regards the investment in land, that is regulated by sect. 24; and the 2nd sub-section says, referring to land which has been acquired by purchase, or in exchange, or on partition, that "freehold land" which has been acquired by purchase shall be conveyed "to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging." Then I must read that in connection with sub-sect. 5,—"Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge." Now the 5th sub-section undoubtedly provides that land purchased by moneys arising from the sale of land subject to a charge is to be conveyed subject to that charge; but it was considered necessary to insert an express provision directed to this particular matter, and the conveyance in that way would not necessarily have followed merely from the provisions of the 2nd sub-section. It is obvious from a comparison of the 2nd sub-section with the 5th that the Act contemplates that the settled land may, as to part, be subject to a charge, and as to the rest be free from it, and there is an express provision with reference to the conveyance of land when moneys arise from the part which is subject to the charge. I think that the charge which is referred to in sub-sect. 5 is not merely one which takes priority over the settlement; but extends to charges which are created by the settlement itself. The word is used in various parts of the Act with reference to both, and conspicuously in sect. 20, which deals with conveyances; and as to the operation of conveyances made by the tenant for life under the Act, it is expressly enacted by sub-sect. 2 that such a deed is effectual to pass the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates,

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interests, and charges subsisting, or to arise thereunder, but subject to and with the exception of (i.) all estates, interests and charges having priority to the settlement." So that the word "charge" is used there with reference to both classes, and I see no reason why in sub-sect. 5 of sect. 24 that should be limited to charges existing in priority to the settlement. I think, therefore, that as regards the purchase of lands, that rests on the peculiar provisions of sect. 24 with reference to those portions of settled land which are subject to charges.

Then I have next to consider whether there is anything in the way in which the payment off of incumbrances is dealt with which would lead me to suppose that it was not intended by the Act that the power to apply the money in payment off of incumbrances should extend to paying off incumbrances on the part of the land which is not subject to the charge. Now, that is governed by sect. 21, sub-sect. 2, which provides that capital money arising under the Act may be applied in "discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land." Mr. *Borthwick* directed my attention to sect. 5, which provides that where on a sale, exchange or partition there is an incumbrance "affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly." That is to say, there are special powers given, on a sale, exchange, or partition, to the tenant for life to shift incumbrances from one part of the settled estate to the other; and the suggestion is that there is no power in the absence of an express provision to apply capital moneys arising from one part of the settled estate in discharge of incumbrances on another part. I think that that would be taking too narrow a view of the Act. It has been decided by Mr. Justice *Pearson* in *In re Chaytor's Settled Estate Act* (1) that capital moneys arising under the Act may be applied in the discharge, purchase or redemption of incumbrances which affect only a part of the settled land. The question which I have now to consider and deal with is whether when the capital money arises from the part of the settled land which is subject to the charge, I can apply it in discharge of the incumbrances affecting the other part. Now there is no restriction expressly imposed by the Act, and it seems to me that in the absence of express restriction I ought not to hold that there is no such power, and that the real answer to any difficulty which arises out of the supposition of the existence of such a power is that it is not to be exercised arbitrarily by the tenant for life, but, under sect. 53, is to be exercised, as all the other powers are, with a due regard to the interests of all parties entitled under the settlement. By that section the tenant for life is, in relation to the exercise of such a power, to be "deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Therefore it is his duty in exercising the discretion which is vested in him under the Act as to the application of capital moneys, to consider whether he is unduly prejudicing any of the parties by the proposed exercise of that discretion, and if he is, then it would not be proper so to exercise the discretion; but where it is a matter of doubt, in the absence of any reason for supposing that the discretion is unfairly exercised, then that discretion ought to prevail. I may illustrate that by reference to the mode in which the income arising during the term of 1000 years is to be applied in the present case. It is, leaving out the debts, funeral and testamentary expenses, legacies and annuities, to be applied in payment off of mortgage debts on the four estates in the following order, *Staffordshire, Leicestershire, Cheshire,* and *Lancashire*—*Lancashire* being the last. Now, I think it would hardly be disputed that the capital moneys arising from the *Lancashire* estate could be applied in discharge, at the discretion of the tenant for life, of incumbrances on the *Lancashire* estate, notwithstanding the direction of the will as to the proceeds of the income arising during the term of 1000 years. I think that point has, in substance been decided already by Mr. Justice *Chitty*, in the case of *Clarke* v. *Thornton* (1), with reference to improvements. There the will had thrown the improvements on the income, and yet it was held that notwithstanding the express provision made by the will, the tenant for life had a right under the Act to have capital moneys arising under the Act applied for improvements. It seems to me that the reasoning which prevailed in that case with reference to improvements would also prevail so as to enable incumbrances on the *Lancashire* estate to be paid off out of capital moneys arising under the Act, in priority to the *Staffordshire* estate for example, although the income which arises under the trusts of the term of 1000 years can only, under the terms of the will, be applied in paying off incumbrances on the *Lancashire* estate in the last place, and after all the incumbrances on the three other estates are satisfied.

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(1) 25 Ch. D. 651.

Then, again, the contention on behalf of the persons interested in the *Staffordshire* estate is this, that if the capital money is taken and applied in improvements on the *Leicestershire* estate, or is taken and applied in payment of incumbrances on the *Leicestershire* estate, the persons who are entitled to the *Staffordshire* estate will be deprived of a certain amount of income during the term of 1000 years, which would be available for payment of the debts on the *Staffordshire* estate. Now there might be circumstances under which that argument would deserve the very greatest weight. Suppose, for example, that the *Staffordshire* estate was heavily incumbered, and so heavily incumbered that according to any reasonable calculation the whole of the income available during the 1000 years would be required to discharge those incumbrances; then it would seem to me that it would not be a fair exercise of the discretion vested in the tenant for life to take the moneys arising from the *Lancashire* estate, and pay off the debts of the *Lancashire* estate in the first instance; but if the *Staffordshire* estate is only moderately incumbered, and there are ample means under the term of 1000 years for paying off the mortgages on the *Staffordshire* estate, then the only result is this, that instead of the *Staffordshire* mortgages being paid off quickly under the term of 1000 years, a little longer time will be required for the complete discharge of those incumbrances, and it would, as it seems to me, be a fair question for the tenant for life to consider which course would be most for the benefit of all parties interested in the settled estate, and if he comes to the conclusion, in the exercise of a fair discretion, that it is better that the money should be applied in payment off of incumbrances, or for the purpose of improvements, then I think that there is power so to do, and that the discretion ought not to be interfered with. I might give other illustrations of the same thing. If, for example, the *Leicestershire* estate was heavily incumbered, as I understand it is, and if it were sought to apply such a large amount of the capital moneys that the *Staffordshire* estate would practically be deprived of any benefit, then I should not think that a fair exercise of discretion; but if it is simply a question of the time at which the *Staffordshire* estate will be discharged and the effect of applying the money in the way proposed will merely be to postpone for a little longer the complete discharge of the *Staffordshire* estate, then I should consider that that would be a fair matter for the exercise of the discretion of the tenant for life. I give these instances simply as general illustrations of the way in which I view the Act.

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(1) 35 Ch. D. 307.

It seems to me, on the whole, that there is nothing in the Act, either as regards the application of the capital money for the purchase of land or for the purpose of paying off incumbrances, which prevents me from saying that there is power to do what is sought to be done; and that it is a matter for the discretion of the tenant for life to be exercised in accordance with the provisions of sect. 53 in each case as to whether the particular application ought to be made. I think therefore in this case, it not being alleged that anybody will be irretrievably prejudiced by the proposed application, that I may say that, as regards the capital moneys arising from one moiety of the *Lancashire* estate, they may be applied for the improvement of the *Leicestershire* estate, and there must be a declaration to that effect. There will also be a direction that the costs of and incidental to this application, including the costs of the tenant for life, and her solicitor and surveyor, in the preparation and carrying out of the

STIRLING, J. 1889 *In re* LORD STAMFORD'S SETTLED ESTATES.

necessary schemes, may be taxed as between solicitor and client, and paid out of capital moneys arising from the *Leicestershire* and one moiety of the *Lancashire* estates.

Solicitors: *Smith, Fawdon & Low*, agents for *T. Wright, Leicester*; *Bower, Cotton & Bower*; *Iliffes, Henley & Sweet*, agents for *Laycock, Dyson & Laycock, Huddersfield*; *Evans, Foster & Wadham.*

W. W. K.

In re COMBINED WEIGHING AND ADVERTISING MACHINE COMPANY.

C. A.
1889
NORTH, J.
June 1.
C. A.
Oct. 28.

Company—Winding-up Petition—Locus Standi of Petitioner—"Creditor"—Garnishee Order absolute against Company—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 80, 82 [*Revised Ed. Statutes, vol. xiv., pp.* 220, 221]—*Rules of Supreme Court,* 1883, *Order* XLV. *r.* 2.

A garnishee order does not create, as between the garnishor and garnishee, any debt either at law or in equity.

Accordingly, a person who has obtained a garnishee order absolute directing a company to pay to him a debt due by them to a creditor of his against whom he had recovered judgment, does not thereby himself become a creditor of the company, and is not, therefore, entitled to petition for the winding-up of the company, on failure by them to obey the order.

The order of *North,* J., affirmed.

APPEAL from Mr. Justice *North.*

This was a petition for the winding-up of the *Combined Weighing and Advertising Machine Company* (incorporated under the *Companies Act,* 1862), which was presented by *J. B. Ball.*

The Petitioner alleged that on the 19th of November, 1888, he had obtained a garnishee order absolute, directing the company forthwith to pay to him a sum of £38 6*s.* 10*d.* due from them to one *J. W. Wright,* against whom the Petitioner had recovered judgment for £57 5*s.* 6*d.*, and that in default of payment execution might issue for the same. On the 27th of November, 1888, the company having made default, the Petitioner levied execution under the garnishee order, but the sheriff was unable to find any goods belonging to the company on which he could levy. The petition contained the following allegations:—"The said sum of £38 6*s.* 10*d.* remains wholly unpaid and unsatisfied, and the amount thereof is justly due and owing by the company to your Petitioner. The company is unable to pay its debts. Under the circumstances it is just and equitable that the company should be wound up."

The petition was heard before Mr. Justice *North* on the 1st of June, 1889.

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Eve, for the Petitioner.

Firminger, for the company :—

There is a preliminary objection to the petition—that the Petitioner is not a "creditor" of the company within the meaning of s. 82 of the *Companies Act*, 1862, and is, therefore, not entitled to petition. A garnishee order absolute does not operate to transfer the garnished debt to the garnishor; it only makes the garnishor the agent of the original creditor to receive the debt, but the debt is not due to him. It remains due to the original creditor and he is the "creditor" of the garnishee in respect of it: *Chatterton* v. *Watney* (1). Sect. 82 of the *Companies Act*, 1862, ought to be construed as strictly as the provisions of the *Bankruptcy Act*, 1883, relating to a bankruptcy notice: *Ex parte Chinery* (2). If the Petitioner is a "creditor" of the company at all, he can only be so by virtue of an assignment of the debt to him. A debt was not assignable at common law, and an assignment can only be made by virtue of sub-sect. 6 of sect. 25 of the *Judicature Act*, 1873, which applies only to "an absolute assignment by writing under the hand of the assignor."

George White, for shareholders :—

Even if the Petitioner were an assignee of the debt he would not be entitled to present the petition. In *In re London and Birmingham Flint Glass and Alkali Company* (3) there is nothing more than a *dictum* to the contrary. The same observation applies to *In re Paris Skating Rink Company* (4). But the latter case clearly decides that the right to proceed with a petition for the winding-up of a company cannot be assigned.

Garnishee proceedings are strictly common law proceedings, and the Court will not give them an extension in equity.

The debt due by a company to a creditor cannot be subdivided so as to entitle a number of garnishors to petition for the winding-up of the company. In *In re European Banking Company* (5) a creditor for £65 presented a petition for the winding-up of a company. His debt had been attached in the Lord Mayor's

(1) 17 Ch. D. 259.
(2) 12 Q. B. D. 342, 343.
(3) 1 D. F. & J. 257.
(4) 5 Ch. D. 959.
(5) Law Rep. 2 Eq. 521, 523.

Court, and though *Kindersley*, V.C., expressed an opinion that, if this had been the only petition, the Court would not have made a winding-up order on it, "on the ground that the interest of the petitioner as a creditor is so uncertain in its character, that the Court ought not, upon the ground of that interest, to impose upon the shareholders of the company so great a burden as a winding-up order," still he said that the petitioner remained legally a creditor of the company.

Eve, for the Petitioner:—

Sect. 80 of the *Companies Act* provides that a company shall be deemed to be unable to pay its debts (*inter alia*) whenever "a creditor, by assignment or otherwise," to whom the company is indebted in a sum exceeding £50 then due, has served on the company a demand for payment, and the company has for three weeks neglected to pay the same. This throws light on the meaning of the word "creditor" in sect. 82. By the garnishee order the garnishor obtains a charge on the debt, and becomes a creditor in equity of the garnishee. Though he is not a creditor by "assignment," he is a creditor "otherwise." A garnishee order absolute is a positive order to the garnishee to pay the debt to the garnishor, who alone can give a valid receipt for the debt. If the original creditor had presented a petition to wind up the company, the company would have had a good defence, that by reason of the garnishee order they could not pay the debt to the Petitioner. If the garnishor cannot petition, no one can petition in respect of a debt which has been garnished.

[North, J.:—Possibly the garnishor and the original creditor might join as co-Petitioners.]

In *In re Olathe Silver Mining Company* (1) it was held that the holder of debentures of a company, which were payable to bearer, (the debentures having been deposited with him by the original holder as security for a debt and the interest on them being overdue), was entitled to present a petition to wind up the company.

[North, J.:—In that case there was a transfer of the debt.]

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(1) 27 Ch. D. 278.

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NORTH, J.:—

The Petitioner rests his right to petition for a winding-up order on the allegation that he is a creditor of the company. He has recovered judgment against *Wright*, who was a creditor of the company, and he has obtained a garnishee order absolute against the company in respect of the debt due to *Wright* from the company. Independently of the claim of the Petitioner, if *Wright* himself had presented a petition he would have been entitled to a winding-up order. It may be that, as Vice-Chancellor *Kindersley* seems to have thought in *In re European Banking Company* (1), by reason of the garnishee order, the original creditor has lost the right to present a winding-up petition, or that so much doubt has been thrown on his title that the Court would not entertain a petition by him. But the question is, whether his right has been transferred to the present Petitioner—in other words, whether the garnishee order absolute has transferred the debt to him. In my opinion it has not done so. The case of *Chatterton* v. *Watney* (2), is, I think, a distinct authority that a garnishee order absolute has not the effect of transferring the garnished debt to the garnishor. If that be so, *Wright* remains the creditor of the company in respect of this debt. The debt has not been assigned to the Petitioner, and he is not a "creditor" of the company in respect of it. I must construe the *Companies Act* on the same principle as the Court of Appeal construed the *Bankruptcy Act* in *Ex parte Chinery* (3). In that case it was held that a garnishee order absolute was not a "final judgment" against the garnishee, and Lord Justice *Cotton* expressed an opinion (4) that it did not make the garnishor a creditor of the garnishee. The petition must be dismissed.

W. L. C.

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The Petitioner appealed. The appeal was heard on the 28th of October, 1889.

Eve, for the Appellant:—

The effect of the garnishee order was to put the Petitioner in the position of a creditor of the company. It did not perhaps operate as an absolute transfer of the debt, for such a transfer would deprive the original creditor of the right to get it in, even if he paid off the Petitioner; but it was an equitable transfer of the debt, giving the Petitioner the right to collect the debt, and get it in as best he could; and if he is not in the position of a creditor and execution fails against the company, the garnishee order is useless and there is a dead lock.

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(1) Law Rep. 2 Eq. 521.
(2) 17 Ch. D. 259.
(3) 12 Q. B. D. 342.
(4) Ibid. 343.

[He also made use of the same arguments as in the Court below, and, in addition to the authorities there cited, referred to *Ex parte Moss* (1).]

Firminger, for the Company, and *George White*, for shareholders, also made use of the arguments reported in the Court below; and they cited the following additional authorities: *Ex parte Blanchett* (2); *Ex parte Hyde* (3); *Butler* v. *Wearing* (4); *Wood* v. *Dunn* (5), and *Ex parte Pillers* (6).

Eve, in reply.

Cotton, L.J.:—

When this case was opened, from the way in which it was presented to us, we thought it turned on the question whether the Petitioner had a case under sect. 80, sub-sect. 2; but, really, we do not come to that question at all, because what the Court has here in the first instance to consider, is not whether the Petitioner has made out a case for winding up the company (which I very much doubt), but whether he is a person who is entitled to present a winding-up petition. That question turns on sect. 82 of the *Companies Act*, 1862. The Petitioner contends that he is entitled to present such a petition, not as a contributory, but as a creditor. Well, is he a creditor? He is no creditor of the company unless and except so far as the garnishee order which he obtained made him a creditor. Mr. *Wright* owed him money; he got a judgment against *Wright*, and, having done so he attached a debt due from the company to *Wright*, and that is made absolute.

(1) 14 Q. B. D. 310.
(2) 17 Ibid. 303.
(3) 20 Ibid. 690.
(4) 17 Q. B. D. 182.
(5) Law Rep. 2 Q. B. 73.
(6) 17 Ch. D. 653.

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Now, what does the garnishee order do? It is no assignment to any extent of the debt due by the garnishee to the debtor of the garnishor; it merely gives the garnishor a lien upon that debt. That was laid down by the late Master of the Rolls, confirming the view taken by myself in *Chatterton* v. *Watney* (1), where (2) Sir *George Jessel*, M.R., says "I quite agree with the view of the Lord Justice *Cotton*, that a garnishee order does not operate as a transfer of the debt." "Transfer" does not mean necessarily absolute transfer, but a transfer of the debt by way of assignment, security, or otherwise. In this case if there had been such a transfer or assignment of the debt as to constitute the Petitioner an assignee of it either in law or equity, and to entitle him to present a petition as a creditor under sect. 82, we should still have to consider whether he had made out a case for winding up this company. But, on the ground that he is not entitled to present the petition, I think it unnecessary to go into the question whether there is any case for winding up the company under sect. 80. I consider that Mr. *J. B. Ball* is not in any way a creditor of the company, and not in any way entitled to present a winding-up petition.

I ought to mention the question as to whether this is an equitable assignment of the debt. Of course, if there had been an order by the person to whom the debt was owing to pay to the Petitioner, that would have been a good equitable assignment. But, in my opinion, a mere garnishee order attaching the debt and enabling the person who has obtained the order to give a good discharge, does not come within the principle of equitable assignment, and therefore the Petitioner cannot under the doctrine of equitable assignment claim to be a creditor in this case.

BOWEN, L.J.:—

I am of the same opinion. The real point is whether the Appellant is or is not a creditor within sect. 82 of the Act. I think in all probability, having regard to the language of the preceding section, and I will assume, though it is not necessary to decide it, that "a creditor" under sect. 82 includes a creditor in equity as well as in law. It is not necessary, as I say, to decide it, and I believe it was left undecided in a case before one of the Vice-Chancellors. I should think it would include it. In any case I cannot see here that this statutory relation, which was created originally by the *Common Law Procedure Act* of 1854, and was perpetuated in the rules under the *Judicature Act*, is really a relation involving the creation of a fresh debt. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a Court of Common Law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I think that the relation which is created by that section and the orders made under it does not create a debt at all; it creates an attachment of a portion of the debt, and in case of non-payment confers the right of issuing execution and nothing more. We must remember that these winding-up sections cannot be extended lightly or loosely, because they are procedure in the nature of execution against the company, and involve important results against property.

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(1) 17 Ch. D. 259. (2) 17 Ch. D. 262.

FRY, L.J.:—

I am of the same opinion. The 2nd rule of Order XLV. of the Rules of the Supreme Court provides that the service of the garnishee order on the garnishee "shall bind the debt" in his hands. The question, I take it, is, what is the meaning of the words "bind the debt in his hands"? Now it has been argued that it amounts to a transfer of the debt. If that was the meaning, it is remarkable that that word was not used, and that the order does not say "transfer" the debt; but, further than that, the whole scheme of the order is inconsistent with its being a transfer of the debt. It is plain to my mind that there is no transfer of the debt. It is equally plain to my mind that the garnishee order therefore does not make the garnishor a creditor of the garnishee. What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, "You shall not pay to your creditor the money which you owe him." It enables him to give a valid receipt and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights, but there is no transfer of the debt, and he is not created a creditor. The appeal must accordingly be dismissed with costs.

Solicitors: *Norris, Allens, & Chapman; Perkins & Sawyer.*

W. W. K.

C. A.
1889
KAY, J.
May 11, 14, 27.
C. A.
Oct. 30; *Nov.* 12.

In re FRISBY.
ALLISON *v.* FRISBY.

[1889 F. 506.]

Statute of Limitations—Principal and Surety—Mortgagor and Mortgagee—Covenant for payment of Mortgage Debt—Payment of Interest—Real Property Limitation Act, 1874 (37 *&* 38 *Vict. c.* 57), s. 8 [*Revised Ed. Statutes, vol. xvii., p.* 253]—*Mercantile Law Amendment Act,* 1856 (19 *&* 20 *Vict. c.* 97), s. 14 [*Revised Ed. Statutes, vol. xii., p.* 1014].

By a mortgage deed dated in 1872, *F.* the mortgagor, and *M.* as his surety, jointly and severally covenanted for payment of the mortgage debt with interest on the 10th of June, 1873. *F.* paid the interest till 1880, but paid nothing afterwards. *M.* died in 1888, never having made any payment or given any acknowledgment. The executrix of the mortgagee claimed to be a creditor against *M.*'s estate for the mortgage debt and interest.

Held, by *Kay*, J., and by the Court of Appeal, that assuming the 8th section of the *Real Property Limitation Act*, 1874, to apply to an action brought on a covenant in a mortgage deed, not against the mortgagor as in *Sutton* v. *Sutton* (1), but against a surety, the payment of interest by the mortgagor prevented the statute from running in favour of the surety, and that the right against *M.*'s estate was not barred.

Per Cotton, L.J.:—Sect. 8 is applicable to an action against a surety as well as to one against the mortgagor.

Per Bowen, L.J., and *Kay*, J.:—The section does not apply to a personal action unless brought against the mortgagor or his representatives.

By indenture dated the 10th of December, 1872, between *Edward Frisby* of the first part, *Matthew Frisby* of the second part, and *M. A. Scotney* of the third part, in consideration of £800 lent by Miss *Scotney* to *E. Frisby*, *Edward Frisby* covenanted to surrender certain copyholds to the use of Miss *Scotney*, her heirs and assigns, subject to a condition for making the indenture void if *E. Frisby* should pay the £800, with interest at £4 5*s.* per cent., on the 10th of June next. *Edward Frisby*, and *Matthew Frisby* "as the surety of the said *Edward Frisby*," jointly and severally covenanted with Miss *Scotney* that they, their heirs, executors, or administrators, would on the 10th day of June then next pay to Miss *Scotney*, her executors, administrators, or assigns, the £800, with interest at £4 5*s.* per cent. per annum from the date of the deed. There was no covenant for payment of subsequent interest.

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(1) 22 Ch. D. 511.

Edward Frisby paid interest on the mortgage down to the 10th of December, 1880, and no longer. No interest was ever paid by *Matthew Frisby*, nor any acknowledgment made by him.

Before executing the above indenture, *E. Frisby* had covenanted to surrender the same copyholds to *Perkins*, to secure £4000 and interest, and a surrender was passed on the 19th of July, 1873. In 1882 the executors of *Perkins* took possession of the copyholds, the rents of which were insufficient to pay the interest on their mortgage and on a sum of £400 unpaid purchase money which was charged on the property.

Matthew Frisby died in June, 1888, and on the 5th of April, 1889, Miss *Allison*, the surviving executrix of Miss *Scotney*, took out an originating summons against *Joseph Frisby*, the heir-at-law and administrator with the will annexed of *M. Frisby*, asking for an order declaring that she was entitled to rank as a creditor against the estate of *M. Frisby* under his covenant in the mortgage deed, for £800, and interest thereon from the 10th of December, 1880, or for such other period as to the Court should seem right, and for administration of his estate if the Defendant did not admit assets.

The summons came on for hearing before Mr. Justice *Kay* on the 11th of May, 1889.

Renshaw, Q.C., and *Townsend*, for the Plaintiff:—

This proceeding is on the covenant by *Matthew Frisby*, the surety, and the only Statute of Limitations applicable to the case is 3 & 4 Will. 4, c. 42. Under that statute the period of limitation is twenty years, and we are therefore well within the period. We should be entitled to proceed on the covenant at any time within the twenty years, even if the remedy against the land were barred: *Manning* v. *Phelps* (1).

Sect. 8 of the *Real Property Limitation Act*, 1874, has no application to the present case. It is true that in *Sutton* v. *Sutton* (2), a decision which was a surprise to the profession generally, the Court of Appeal held that the section applied not only to an action against the land, but also to an action against a mortgagor on the personal covenant in the mortgage deed; and in *Fearnside* v. *Flint* (3), referred to with approval in *In re Powers* (4), the principle of *Sutton* v. *Sutton* was extended by Mr. Justice *Fry* to an action on a collateral bond given by the mortgagor to secure the mortgage debt. But in *In re Powers* the Court of Appeal declined to extend the principle to an action against sureties on a bond to secure the mortgage debt, and it is submitted that the decision in *Sutton* v. *Sutton* ought not to be extended beyond the case of an action against the mortgagor.

But even if the case could be brought within sect. 8 of the Act of 1874, our claim is not barred, because there has been, within the twelve years limited by that Act, payment of interest by *Edward Frisby*, the mortgagor, and this is sufficient to take the case out of the statute: *In re Powers.* Reliance may be placed on sect. 14 of the *Mercantile Law Amendment Act*, 1856, providing that no co-contractor or co-debtor shall lose the benefit of the enactments there referred to by reason of payment of any principal or interest by a co-contractor or co-debtor; but that section, though referring expressly to 3 & 4 Will. 4, c. 42, does not refer to 3 & 4 Will. 4, c. 27 (for sect. 40 of which sect. 8 of the Act of 1874 is substituted), and therefore cannot avail the Defendant if he relies on the Act of 1874.

If we are entitled under the old Act to sue the mortgagor within twenty years, and there is nothing to restrict our rights as against him, what is there to restrict our rights as against the surety? There is nothing in the Act of 1874 cutting down any right against the surety within twelve years. This is an action of indemnity. What we can recover against the surety is, not the sum payable under the mortgage, but a sum equivalent to that sum.

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(1) 10 Ex. 59.
(2) 22 Ch. D. 511.
(3) 22 Ch. D. 579.
(4) 30 Ch. D. 291.

[They referred also to *Cockrill* v. *Sparkes* (1).]

Marten, Q.C., and *Percival*, for the Defendant:—

This claim is barred by statute. The proceeding is brought to recover a sum of money "secured by mortgage" and "charged upon land" within the meaning of sect. 8 of the Act of 1874, and the period of limitation is therefore twelve years, and has expired. *Sutton* v. *Sutton* (2) and *Fearnside* v. *Flint* (3) shew that the section is not confined to the remedy against the land, but extends also to the personal remedy on covenant for a debt charged on land. *In re Powers* (4) proceeded upon the grounds that the action in that case was brought, not to recover the mortgage debt, but for damages because the mortgagor did not pay, and that the debt of the sureties in that case was a distinct and separate debt from that of the mortgagor. But in this case the proceeding is simply on covenant to recover a mortgage debt, and the covenant is by a surety to pay "the aforesaid sum," *i.e.*, the same debt as that of the mortgagor.

Sect. 14 of the *Mercantile Law Amendment Act*, 1856, is in point, and prevents the payment of interest by *Edward Frisby* from affecting the position of *Matthew*. It is impossible to say that he was not a "co-contractor" with *Edward*; and it is established that that section applies to the case of a surety: *Cockrill* v. *Sparkes*. It is true that the section refers in terms only to 3 & 4 Will. c. 42, but the effect of sect. 8 of the Act of 1874, as interpreted by *Sutton* v. *Sutton*, is to substitute twelve years for twenty in the provisions of 3 & 4 Will. c. 42, applicable to an action of covenant to recover money charged upon land.

[They also referred to *Manning* v. *Phelps* (5).]

Renshaw, in reply.

(1) 1 H. & C. 699.
(2) 22 Ch. D. 511.
(3) 22 Ch. D. 579.
(4) 30 Ch. D. 291.
(5) 10 Ex. 59.

1889. May 27. KAY, J. (after stating the facts of the case continued as follows):—

From these dates it appears that the mortgage debt is not barred as against *Edward Frisby*, the mortgagor, and that the claim against *Matthew's* estate is made within twenty years from the date of the covenant, and less than twelve years after the last payment of interest by *Edward Frisby*, the principal debtor.

The defence is that the remedy is barred under the 8th section of 37 & 38 Vict. c. 57. [His Lordship read the section and continued:—] This section is in the same words as sect. 40 of 3 & 4 Will. 4, c. 27 (the Act for limiting actions and suits respecting real property), except that "twelve" is substituted for "twenty." Chapter 27 received the royal assent on the 24th of July, 1833, but the operation was not to begin till after the 31st of December, 1833. Chapter 42 received the royal assent on the 14th of August, 1833, and sect. 3 relates to any action commenced after the end of that session of Parliament in which it was passed—that is, before chapter 27 came into operation.

In *Doe* v. *Williams* (1), where, however, the question did not directly arise, Mr. Justice *Littledale* said (2), referring to chapter 27: "The 40th section relates to actions brought to recover the money, and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it."

On the other hand, as to sect. 42 of chapter 27, which limits six years for the recovery of arrears of rent or interest on money charged on land, the two statutes have been reconciled by holding that if there be, in addition to the charge, a covenant for payment, the remedy on the covenant exists for twenty years. The point has been discussed in many cases, the most material of which are mentioned in the judgment of Lord Chancellor *Cottenham*, in *Hunter* v. *Nockolds* (3), his Lordship saying (4), "The provisions of the two" statutes "must, if possible, be reconciled, which can only be done by considering the first Act as applicable only to the land, and the latter as applicable only to the person." If this construction were adopted as to sect. 40, an action upon a

(1) 5 Ad. & E. 291.
(2) Ibid. 296.
(3) 1 Mac. & G. 640.
(4) Ibid. 652.

covenant in a mortgage would be governed, not by that section, but by the other statute, 3 & 4 Will. 4, c. 42.

Nevertheless, in *Sutton* v. *Sutton* (1), the Court of Appeal held that the enactment in 37 & 38 Vict. c. 57, following the words of sect. 40 of 3 & 4 Will. 4, c. 27, deprived the mortgagee of his remedy by action against the mortgagor upon his covenant in the mortgage deed after twelve years. And in *Fearnside* v. *Flint* (2) it was decided that the same limitation applied to an action against the mortgagor upon a bond given by him to secure the mortgage debt.

In a later case of *In re Powers* (3) the Court of Appeal decided that this did not apply to an action against sureties on a bond by them conditioned to be void if the mortgagor should pay the debt and interest according to his covenant in the mortgage deed. The ground of this decision, as stated by Lord Justice *Bowen*, was that the action against the surety was not a proceeding against the mortgagor, nor to recover the mortgage debt, but was an action to recover damages because the mortgagor did not pay. Lord Justice *Cotton* does not treat it as an action for damages, but he says: "The debts are different debts, one is the debt of the mortgagor, the other is the debt of the surety." Lord Justice *Lindley* says: "It is difficult to say that the bond is for the same debt;" and he also said that the bond remained in force because the remedy against the mortgagor had been kept alive by payment of the interest by him within twelve years. Lord Justice *Bowen* adds: "If the bond could be brought within the 8th section, I think it must be held that the part-payments by the mortgagor would prevent that clause from barring the remedy."

These last remarks point to a curious result of the decision in *Sutton* v. *Sutton*. The statute 3 & 4 Will. 4, c. 42, s. 3, limits twenty years after the cause of action as the time within which an action may be brought upon a bond or covenant. The *Mercantile Law Amendment Act*, 1856, s. 14, expressly referring to that section, provides that no co-contractor or co-debtor shall lose the benefit of that enactment by reason of payment of any principal or interest by a co-contractor or co-debtor. There is no similar provision saving the benefit of the Act 37 & 38 Vict. c. 57. So that, in this case, if the payments by the mortgagor would not avail to prevent the bar of twenty years under the Act of Will. 4, they would prevent the bar of twelve years under the later statute, assuming that it applies to the surety, if made within twelve years, even though the twenty years had expired.

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(1) 22 Ch. D. 511.
(2) 22 Ch. D. 579.
(3) 30 Ch. D. 291.

The case of *In re Powers* (1) shews a disinclination on the part of the Court of Appeal to extend the construction adopted in *Sutton* v. *Sutton* (2) to a covenant by any person other than the mortgagor himself. An action upon a bond is not, strictly speaking, an action for damages. But where the condition points to indemnity, the debt on the bond is cut down to such an amount as will satisfy that liability. In the action on this covenant against the surety, no more can be recovered than the amount left unpaid by the mortgagor. In that sense it is as much an action of indemnity as the other, but I do not rely on that reason at all.

Suppose *A.* borrowed money and gave a bond in which *B.* joined jointly and severally, and that *B.*, being only a surety, gave to the lender a collateral mortgage, would the remedy against *A.* be barred in twelve years? Or suppose *A.*, *B.*, *C.* and *D.* joined in a joint and several bond for money lent to them all, and one of them gave a mortgage, is the remedy against all the rest barred in twelve years? Or, again, if *A.* gave a bond alone for money borrowed by him, and *B.*, who did not join in the bond, gave a mortgage for the amount as surety, is the remedy against *A.* barred after twelve years? If the remedy in this case is barred by the lapse of twelve years, I do not see why it should not be in all the cases I have put.

In my opinion it would be extravagant to say that the statute applies in any of these cases, and I think, I confess, that the decision in *Sutton* v. *Sutton* ought not to be extended beyond the case of an action against the mortgagor himself. On this ground I hold that it does not apply in the present case. If it otherwise would apply, I see no reason why the payments by the principal debtor do not keep the debt alive against the surety.

C. C. M. D.

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(1) 30 Ch. D. 291.

(2) 22 Ch. D. 511.

The Court accordingly made an order declaring the Plaintiff entitled to rank as a creditor against *Matthew Frisby's* estate for £800, with interest at £5 per cent. per annum from the 5th of April, 1883, and directing the usual administration account if the Defendant did not admit assets.

The Defendant appealed. The appeal was heard on the 30th of October, 1889.

Marten, Q.C., and *Percival*, for the Appellant:—

We say (1) that the statute 37 & 38 Vict. c. 57, s. 8 (*Real Property Limitation Act*, 1874) applies to this covenant in the mortgage deed, and (2) that a payment or acknowledgment to take a case out of the statute must be made by the person against whom the action is brought or by one whom he represents. Where a surety covenants for payment of the debt there must be payment or acknowledgment by the surety. *Sutton* v. *Sutton* (1) shews that a covenant of this description is covered by the section. In *Fearnside* v. *Flint* (2) it was decided that the fact of the bond being a separate instrument made no difference. *In re Powers* (3) is cited against us, but is distinguishable. The bond there given was held to constitute a separate and independent liability.

[FRY, L.J., referred to the observations of Lord Justice *Cotton* (4), and Lord Justice *Lindley* (5).]

They are referable to the special nature of the security in that case. *Chinnery* v. *Evans* (6) and *Dickenson* v. *Teasdale* (7) shew that payment, in order to stop the statute, must be by the person whom it is sought to charge.

[*Cockrill* v. *Sparkes* (8) was also referred to.]

The construction for which we contend is the most convenient, for it is unjust that a person should be made liable after a lapse of years by reason of payments made without his privity.

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(1) 22 Ch. D. 511.
(2) Ibid. 579.
(3) 30 Ch. D. 291.
(4) Ibid. 295.
(5) 30 Ch. D. 297.
(6) 11 H. L. C. 115.
(7) 1 D. J. & S. 52.
(8) 1 H. & C. 699.

[BOWEN, L.J., suggested the question whether the debt from the surety to the mortgagee was the same debt as that owing by the mortgagor to the mortgagee.]

They must be the same debt or else the mortgagee would have a right to be paid twice over. The *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 14, refers to 3 & 4 Will. 4, c. 42, s. 3, but does not apply to the Act 3 & 4 Will. 4, c. 27, so that section does not prevent the case from being within the statute.

Renshaw, Q.C., and *Townsend*, for the Respondent:—

The question is whether the twenty years allowed by 3 & 4 Will. 4, c. 42, is cut down by any Act in a case like the present. The first mortgagee here took possession before the twelve years had run, so the second mortgagee's right to interest is saved by 3 & 4 Will. 4, c. 27, s. 42, and the statute has not run as regards interest.

[FRY, L.J.:—You are not entitled to interest here, but only to damages in lieu of interest, since there is no covenant to pay interest after the six months: *In re Roberts* (1).]

We contend that the statute applies to such damages as well as to interest proper. But as to the main point, a surety appearing on the face of the deed to be such has covenanted that he and the mortgagor or one of them will pay. Here are two debts, a debt by the mortgagor, and a debt from the surety, which arises if the mortgagor fails to pay. *In re Powers* (2) is distinct on that point.

[FRY, L.J.:—Is there not a distinction between a covenant to pay and a bond conditioned to pay if the mortgagor do not? An action may be brought at once on the former.]

But an action to recover damages in lieu of interest cannot be considered an action to recover money charged on land.

[COTTON, L.J.:—Does *Sutton* v. *Sutton* (3) apply where the action is not brought against the mortgagor?]

We submit that it does not. The Act was intended to affect land, and ought to be construed only as applying to remedies against the owner of land.

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(1) 14 Ch. D. 49.

(2) 30 Ch. D. 291.

(3) 22 Ch. D. 511.

[FRY, L.J.:—Suppose *A.*, having no land, borrows money, and *B.*, as surety, gives a charge for it on his estate. Does the statute run in favour of *A.*?]

If the statute 37 & 38 Vict. c. 57, s. 8 applies, which we submit it does not, the payments keep the right alive.

[FRY, L.J.:—Do the words "by the person by whom the same shall be payable" apply to payment as well as acknowledgment?]

Lord *Westbury* and Lord *Cranworth* appear to have differed on the question in *Chinnery* v. *Evans* (1). We contend that they do not, and that nothing is said as to the person by whom payment is to be made. We do not say that payment by a stranger would do, but payment by any one who is under an obligation to pay keeps the debt alive.

Marten, in reply.

1889. Nov. 12. COTTON, L.J.:—

This is an appeal by the Defendant in the action, who alleges that the Plaintiff's claim is barred by the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), s. 8. The Plaintiff, as representative of a deceased mortgagee, seeks to enforce against the testator's estate a joint and several covenant by the mortgagor and the testator as his surety for payment of the mortgage money, with interest, at the end of six months. Nothing was ever paid by the surety, but the mortgagor paid interest down to 1880. The Defendant, who is the personal representative of the surety, contends that the action is barred by the statute. Sect. 8 is as follows: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving

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(1) 11 H. L. C. 115.

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a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." The interest was paid till a period within twelve years before the commencement of the action, but not by the surety, and the question is whether the section bars the remedy against him or his estate. In *Sutton* v. *Sutton* (1) we decided that the section refers not merely to actions to enforce the mortgage against the land, but also to actions against the mortgagor to enforce a covenant for payment of the mortgage money, so there is no doubt that the section applies to some personal actions. It has been urged that it only applies to an action against the mortgagor, but I do not find anything in the section pointing at such a limitation. In former days when there were two Acts in force, one relating to proceedings against the land, and the other to personal actions, the case might stand differently, but I think it would not be right now to confine the section to one description of action.

But is the claim kept alive by the payment of interest by the mortgagor? In my opinion it is. The section says nothing about the person by whom the money is paid, and in my opinion it is satisfied if the payment is made by any one liable to pay. If the surety takes the benefit of the section he must also take the burden. I think that payment by either principal or surety takes the case out of the statute as against both of them.

The enactment in the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), s. 14, which enacts that a co-contractor or co-debtor shall not lose the benefit of certain enactments so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, has no bearing on the present case, as that Act only refers to certain specified sections of which neither this nor the corresponding section 3 & 4 Will. 4, c. 27, s. 40, is one. There is no authority directly bearing on the present case. *Chinnery* v. *Evans* (2) was relied on by the Appellant, but it

(1) 22 Ch. D. 511.

(2) 11 H. L. C. 115.

seems rather to support the Respondent's case. A mortgage had been made of two estates. The mortgagor sold the equity of redemption in one of them, and it was held that payments afterwards made by him kept the debt alive as against the other estate. The appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion, though not entirely on the same grounds. I agree with Mr. Justice *Kay* throughout, in his reasoning as well as in his result. I do not think that this section was intended to apply to personal actions under a covenant in a mortgage deed if not brought against the mortgagor or his representatives. The language of the section appears to me to point at one liability and one person, not to two liabilities existing in two different persons. Assuming, however, that the section is applicable, I am of opinion that payment of interest by the mortgagor kept the debt alive as against the surety.

FRY, L.J.:—

I give no opinion whether the section applies to an action against a surety, for whether it do or do not, I am of opinion that the decision of Mr. Justice *Kay* is right. If the section do not apply there is an end of the case. If it do, the question is whether the payment of interest by the mortgagor do not take the case out of the section as against the surety. I think that it does. The section does not say by whom the payment is to be made, so the case is within its terms. In my opinion a payment satisfying the words of the section is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it. I agree that payment by a stranger would not do, the money in that case not being paid in discharge of a liability of the person paying it. If we were to confine "payment" to a payment by the person against whom or his representatives the action is brought, I think we should be doing great injustice. It is usual for the mortgagor—not the surety—to pay the interest, and it would be contrary to good sense and the common understanding of mankind that while he is doing so the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment.

Solicitors: *Clarke, Rawlins & Co.*, for *Percival & Son, Peterborough; Beaumont, Son & Rigden*, for *Maurice Brown, Peterborough.*

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STIRLING, J.
June 28.
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Nov. 19, 20.

In re NEW EBERHARDT COMPANY.
Ex parte MENZIES.

Company—Contract for paid-up Shares—Registration of Contract—Contract executed by Company only—Companies Act, 1867, *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

In pursuance of a scheme for the reconstruction of a company in liquidation, a meeting of the debenture-holders, of whom *M.* was one, was held, at which a resolution was passed approving of the scheme to transfer the assets to a new company and to allot certain fully paid-up shares to the debenture-holders in lieu of their debentures. To this resolution *M.* assented. The new company was accordingly formed, and a contract was drawn up and expressed to be made between the new company of the one part, and *M.* and the other intended shareholders of the other part, for allotting the shares in the terms of the resolution, but was executed by the company only. This document was duly registered, and the shares were allotted and accepted by the allottees:—

Held, on a motion by *M.* to rectify the register by removing his name from the list of shareholders, that there was no contract in writing registered within the meaning of the 25th section of the *Companies Act*, 1867, and therefore *M.* could not hold the shares as paid up; and that he was entitled to have his name removed from the register.

THE Applicant, *E. F. Menzies*, was the holder of a £100 debenture bond secured on the property of the *Eberhardt and Monitor Company, Limited.* In the autumn of 1888 the company went into voluntary liquidation. A scheme of reconstruction of the company under the 33 & 34 Vict. c. 104 was proposed, and by order of the Judge in the winding-up a meeting of the debenture-holders was held on the 31st of August, 1888, for the purpose of passing a resolution approving of the scheme. The Applicant and all the other debenture-holders voted in support of the resolution.

By this scheme it was provided that all the property and assets of the company should be sold to a new company to be formed, and that such new company should pay and satisfy all the debts and liabilities of the old company.

By clause B., sect. 1, of the scheme it was provided that the new company should allot and issue to the holders of debentures of the *Eberhardt and Monitor Company* four fully paid-up preference shares of 5*s.* each in the new company for every £1 debenture issued by the old company, such preference shares to be entitled to a non-accumulation dividend of 10 per cent.

On the 19th of September, 1888, an order was made by the Court in the winding-up sanctioning the above-mentioned scheme.

The new company was accordingly formed under the name of the *New Eberhardt Company, Limited*, and on the 25th of September, 1888, an agreement between the *Eberhardt and Monitor Company* and its liquidator and the *New Eberhardt Company* was made and sealed with the seals of both companies for carrying out the scheme sanctioned by the Court. This agreement was not registered under the 25th section of the *Companies Act*, 1867.

On the 28th of September, 1888, another agreement was made or expressed to be made between the *New Eberhardt Company* of the one part and the several persons named in the schedule thereto, who were the holders of debentures in the old company, of the other part, which recited the agreement of the 25th of September, 1888, and it was thereby expressed that in pursuance of the said agreement the new company should issue to the persons named in the schedule the number of shares set opposite their names respectively; and it was agreed and declared that the shares included in the schedule should be held as shares upon which the full sum of 5*s.* had been paid, and should be liable to no further payment, and the document concluded "As witness whereof the *New Eberhardt Company Limited* has caused its common seal to be affixed thereto on the day and year first above written." The seal of the company was duly affixed to the document, but none of the debenture-holders named in the schedule executed it. This agreement was duly registered on the 1st of October, 1888, under the 25th section of the *Companies Act*, 1867.

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The company then proceeded to allot 400 fully paid-up shares of 5*s.* each to Mr. *Menzies*, of which he received notice on the 8th of November, 1888, and a certificate was subsequently sent to him.

Doubts having arisen whether the last-mentioned document was such a contract as was contemplated by the 25th section, Mr. *Menzies* took out a summons before Mr. Justice *Stirling* to rectify the register by removing his name from the list of shareholders, and to order the company to execute and register a proper agreement for the purpose of securing him 400 fully paid-up preference shares.

The summons was heard before Mr. Justice *Stirling* on the 28th of June, 1889.

Whinney, for the Applicant:—

The 25th section of the *Companies Act*, 1867 (1) shews that there must be a contract, which means an ordinary contract, involving a consideration and a legal obligation binding both parties to it. The contract must, therefore, be signed by both the contracting parties: *Firmstone's Case* (2).

It may be said that the company was the contracting party, but my contention is that the document should have been signed by both parties. It was not signed by Mr. *Menzies*, and as he has not got sufficient protection, he is entitled to have the register rectified. A document containing the terms of an agreement between a solicitor and his client, which agreement was assented to by the client, but signed by the solicitor only, was held not to be an agreement within the provisions of the *Attorneys and Solicitors' Act*, 1870 (33 & 34 Vict. c. 28), s. 4; *Ex parte Munro* (3). Sir *George Jessel*, when Master of the Rolls, in *Pooley* v. *Driver* (4), held that an unsigned contract for an advance by way of loan to a trader was not a "contract in writing with a person" within the 1st section of the *Partnership* (*Bovill's*)

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(1) 30 & 31 Vict. c. 131, s. 25: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

(2) Law Rep. 20 Eq. 524.

(3) 1 Q. B. D. 724.

(4) 5 Ch. D. 458, 469.

Act, 1865 (28 & 29 Vict. c. 86). It was not a proper agreement until it was signed. In *In re Almada and Tirito Company* (1), Lord Justice *Cotton* referred to sect. 25 of the *Companies Act*, 1867, and stated what it was intended to provide for, viz. a remedy against the way in which payments for the shares should be made; but the point in this case was not dealt with. Mr. *Menzies* accepted the shares under the belief that there was in existence a complete contract in writing, which the company was bound to register; but he now submits that there was not a contract in writing, because he did not sign it and make it a complete contract in writing, and that therefore the register should be rectified.

Grosvenor Woods, for the Company:—

The company do not desire to have the name of the Applicant upon the register if there be any doubt about the agreement. They do not wish to expose Mr. *Menzies* to any peril. If the document be bad as an agreement, doubts may be thrown upon many other agreements; but in the case of *Bewley* v. *Atkinson* (2), Lord Justice *James* said that an agreement signed by one party was good, and that there was nothing in the *Prescription Act* (2 & 3 Wm. 4, c. 71) which said that the agreement there referred to must be signed by both parties, and that it was a sufficient agreement within the *Statute of Frauds*. Here Mr. *Menzies* had the admission of the company in writing, and that was a sufficient contract to estop them, and it would shew the public that the company were estopped. The object of the agreement was to let the public know whether the shareholders had paid up or not. The scope and intention of the statute shew clearly that there was a sufficient agreement in writing, but if there is any doubt about it the company are quite willing to have the register rectified.

Whinney, in reply.

Stirling, J. (after stating the facts above mentioned, said):—

The document of the 28th of September, 1888, is under the seal of the company; it is not disputed that it is a document

(1) 38 Ch. D. 415.

(2) 13 Ch. D. 283.

which constitutes an agreement between the company and the persons named in the schedule thereto; and it shews that the company had come under an obligation to issue to the holders of debentures of another company, being the persons named in the schedule, shares with 5*s.* paid up; and it operates in satisfaction of the obligation to issue shares accordingly, and declares that the shares so issued shall be deemed to be shares on which the full sum of 5*s.* has been paid, and liable to no further payment.

Now, I have to ask myself this question, is this a contract duly made in writing determining that the shares so issued, and to which it relates, are to be held otherwise than as subject to the payment of the whole amount thereof in cash? It seems to me that it is. It is a legal document made in accordance with the forms in which documents under seal are required to be made according to the English law. It is under the seal of the company, it is binding upon the company, and it shews that it was given for valuable consideration, viz., in satisfaction of a prior obligation subsisting under an agreement which had been previously made between the existing company and the liquidator of another company. It seems to me, therefore, that it is a contract duly made in writing. That is all that the Act of Parliament requires. The Act does not say that the contract shall be signed by all the parties to it, and I do not see why I should say so, or that I am bound to add those words to the Act. No doubt it would satisfy the terms of the Act if the parties of the second part had signed it, but none the less is this a contract made by the company and in writing. Adopting the words of the late Master of the Rolls in *Firmstone's Case* (1), I ask is this a contract made by the contracting party? Surely it is. Who is the contracting party here? The company. Under the statute every shareholder in the company is bound to pay up his shares in cash except upon certain terms. Then a contract is made by the company that the shareholder shall not be bound to pay them up in cash. That contract is the contract of the company and not the contract of the shareholder. Therefore it seems to me that the contract is made in writing by the contracting party as the late Master of the Rolls said it was required to be, and all that was necessary.

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(1) Law Rep. 20 Eq. 524.

Then it is said that the contract must shew there was some consideration moving from the shareholder. I am unable to follow that argument. It is necessary that the contract in order that it may be valid should have some legal consideration; but it does not appear to me that it was necessary that that consideration should, on the face of the contract, move from the party to whom the shares were to be issued. I think that this document completely satisfies the terms of the Act, and that therefore the foundation for this application fails. There will be no order as to the costs.

T. F. M.

C. A.

From this decision Mr. *Menzies* appealed. The appeal was heard on the 19th of November, 1889.

Whinney, for the Appellant:—

The 25th section of the *Companies Act*, 1867, enacts that every share shall be deemed to be issued and held subject to the payment of the whole amount thereof, "unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Unless this provision is strictly complied with the Appellant and the other persons who are named in the schedule to the document of the 28th of September, will be liable for the full nominal amount of their shares. The company have not shewn that the section has been complied with. In the first place there was no agreement between the new company and the Appellant at the time of the execution and registration of the document of the 28th of September. There was no agreement between them till the Appellant accepted the allotment of the shares, which was done under the understanding that there was to be a clearly registered contract: *Ex parte Munro* (1). In the second place, if there was an agreement, no "contract in writing" was registered within the meaning of the section. The document might amount to an offer in writing, but there was no acceptance in writing, and therefore no contract in writing: *Firmstone's Case* (1). There must be a contract binding both parties. In the usual form of agreement in similar cases the contract is made between the company and a trustee or agent for the shareholders, who signs on their behalf; and each shareholder, as he accepts his shares, thereby ratifies the act of his agent, and the ratification dates back to the execution of the contract.

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(1) 1 Q. B. D. 724.

Grosvenor Woods, for the company:—

There was a good contract between the company and the Appellant when the agreement of the 28th of September was signed; for he voted for the scheme and was bound to take the new shares. He had, in fact, offered to take the shares, and his offer was accepted by the company when they set their seal to the agreement. Moreover, there was a written contract between the old and new companies on the 25th of September which was recited in the agreement of the 28th of September. It is not necessary that the contract which is registered should be made at the date which it bears. It is sufficient if it is a written memorandum of a contract previously made. What is called a written contract is in most cases only a memorandum, which is evidence of a contract previously made by parol. There was more than an offer in the agreement of the 28th of September. There was an acceptance also by parol when the Appellant accepted his shares, which he did on the basis of this agreement; and his acceptance dates back and constitutes the document a contract binding on both parties. The object of the statute was that the public should know the terms of the contract, the names of the parties, and the consideration for it; and these conditions are all complied with in the document in question: *Anderson's Case* (2); *Crickmer's Case* (3); *In re Almada and Tirito Company* (4); *Laythoarp* v. *Bryant* (5); *Williams* v. *Byrnes* (6); *Smith* v. *Neale* (7); *Reuss* v. *Picksley* (8); *Warner* v. *Willington* (9); *Bewley* v. *Atkinson* (10).

(1) Law Rep. 20 Eq. 524.
(2) 7 Ch. D. 75, 107.
(3) Law Rep. 10 Ch. 614.
(4) 38 Ch. D. 415.
(5) 3 Scott, 238.
(6) 1 Moo. P. C. (N.S.) 154.
(7) 2 C. B. (N.S.) 67.
(8) Law Rep. 1 Ex. 342.
(9) 3 Drew. 523.
(10) 13 Ch. D. 283.

COTTON, L.J.:—

This is an appeal against a judgment of Mr. Justice *Stirling*, refusing to remove the name of the Applicant (the Appellant here) from the list of shareholders of the new company, which is the *New Eberhardt Company, Limited.* Now, there is no question that he contracted and agreed with this company to take from it certain paid-up shares, that is to say, shares which in law could have no further claim made upon them, but he says that the 25th section of the Act of Parliament has not been complied with, because there had not been, before the shares were issued, a registration of such an agreement as is required by the statute. [His Lordship read the section, and continued:—]

The question upon which this turns is this: whether before the issue of the shares there was a contract made in writing and registered with the Registrar of Joint Stock Companies? What has been done here may have been perfectly honest and well-intentioned, but I am afraid they have not complied with the statute. There was a proposal in the winding-up of the old company to transfer all the assets of the old company to the new company on certain terms, that is to say, that all the debenture holders of the old company were to have fully paid-up 5*s.* shares in the new company to the amount of their debentures. The law has enabled that to be done; but under the Act of 1862 it was necessary that there should be a special resolution passed by the debenture holders in this company, and that was done, that is to say, they authorized the directors of the old company to make a contract with the new company and to transfer to the new company the property of the old company in those shares. To that this gentleman assented.

Then, what was done? There was a memorandum of agreement prepared, expressed to be made between the new company and the persons named in the schedule thereto, which recited a contract between the liquidator of the old company and the new company, and then went on in this way, "and in pursuance of the said agreement," that is, the agreement between the liquidator of the old company and the new company, "and of such request and direction to the liquidator as aforesaid the company shall allot and issue to the persons named in the schedule hereto

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the number of shares set opposite their respective names in the fourth column, and having the distinctive numbers set opposite to them in the fifth column of the schedule and credited as having the full sum of 5*s.* per share paid up thereon. And it is hereby agreed and declared that the shares included in the schedule so to be allotted as aforesaid are to be held as shares upon which the full sum of 5*s.* per share has been paid."

Now this document, which was the thing that was registered, contained, in my opinion, no agreement at all; but I think it contained an offer to give all the debenture-holders named in the schedule fully paid-up shares to the amount standing in their names, and as soon as that was accepted by the debenture-holders then there arose a contract between them and the new company in the terms of and in accordance with this memorandum. If the company had registered, not this document but the agreement between the new company and the liquidator, my present opinion is that that would have been a contract registered to issue these shares as fully paid-up shares. But I cannot see here that there is anything which can amount to a contract in writing registered, because one must look and see what in fact it was that was registered. As I have before intimated, it merely comes to this, an offer made by them in this form, that is to say, to issue shares to any person who would accept them. Now, I cannot see how that can be, within the words of this section, "a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issuing of such shares." At the time when this was filed there had been no acceptance by any person to whom it was intended to allot these paid-up shares, and if it be so, there was no contract at all. I doubt whether there would have been a contract in writing, even although the agreement had been made, by the acceptance by these persons of the terms offered. "A contract made in writing;" that is very different from the terms of the *Statute of Frauds*, because the *Statute of Frauds* says this: "That no action shall be brought unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." It may be, I do not intend to express any opinion upon it, that in accordance with

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the decisions there might be an acceptance by the party even if the acceptance was not in writing and signed by him, merely by circumstances which were afterwards taken to amount to an acceptance. But the Judges have decided those cases upon these special words, "A note or memorandum in writing of the agreement." It was held in *Reuss* v. *Picksley* (1) that there was an agreement made by circumstances which amounted to an acceptance of the offer contained in the memorandum, which was in writing, and there being an agreement, the Court held that there was within the *Statute of Frauds* a good memorandum in writing of the agreement, because all the terms were stated in the document. That was apparently the ground upon which the Court decided, because it was said (2): "All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th of September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute." But the words of this statute are "an agreement made in writing," which is something very different from a "memorandum in writing," and in my opinion it is impossible to say that at the time this document was registered there was in fact an agreement signed in writing, or that an agreement made in writing was signed at or before the time when the shares were issued.

In my opinion, subject to the point that I will deal with now, the case entirely fails. But it was ingeniously suggested by Mr. *Grosvenor Woods* that here there was not a proposal at all—that it was an acceptance of a proposal previously made. As I understood him to say, he assented at the general meeting of debenture-holders to the proposal which was made by the resolution placed before them, that the liquidator should be authorized to enter into the agreement with the new company. There was

(1) Law Rep. 1 Ex. 342.

(2) Law Rep. 1 Ex. 351.

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no proposal made by the debenture-holders to the new company; it was merely that they gave authority to the liquidator to make the proposal to the new company. In my opinion the document registered does not purport to be an acceptance of any offer made by the persons named so as to constitute an agreement in writing made by them. In the present case, there being merely a proposal in writing, an offer made in writing by these persons, it cannot be considered to be an agreement in writing within the 25th section, or that that section has been complied with.

Therefore, not taking the same view that Mr. Justice *Stirling* did, we must make an order that the name of the Appellant be taken off the register of shareholders.

BOWEN, L.J.:—

I am of the same opinion, and I only express my individual view because we are differing from the learned Judge in the Court below. For the reasons given by the Lord Justice it is plain that this document which has been filed is not an acceptance of an offer. There has been no offer made by the Appellant to the company which can be accepted, but only the consent given to a resolution which authorized the agreement between the two companies.

If this is not the acceptance of an offer already made, what is it? It is an offer duly made in writing, and only an offer, till it is accepted, and it was filed while it was an offer only. The offer being something short of the contract, it was not a complete contract when it was filed.

It is true that it did turn afterwards into a contract when it was accepted, but it did not turn into a contract, I think, which was duly made in writing, because the offer only was made in writing, and it certainly did not turn into a contract which had been made in writing at the date when the document was filed, and it only became a contract long after the document was filed.

It is obvious therefore that, unless we are to fritter away the section by putting a forced construction upon it, the section has not been complied with. I regret the necessity of giving this judgment. I think it a most unfortunate slip, and that in substance the object of the Act has been fulfilled, although certain requirements have not been complied with. But we must see that the Act of Parliament is carried out in its letter as well as in its spirit. The cases on the *Statute of Frauds* can have nothing to do with it, and it would not follow because the document would be held to be a contract or memorandum within the *Statute of Frauds*, that therefore it is a contract which fulfills the requirements of a different section in a different Act. *Reuss* v. *Picksley* (1), and the case which preceded it, *Smith* v. *Neale* (2), were not decisions that the document amounted to a contract, but only that it amounted to the memorandum of a contract. We are bound by *Reuss* v. *Picksley*, and that no doubt pushed the literal construction of the *Statute of Frauds* to a limit beyond which it would perhaps be not easy to go; but unless we found the language of the *Statute of Frauds* repeated in this section we should not be bound by *Reuss* v. *Picksley*; and if we were to follow it we should be following that which has not a real analogy.

Fry, L.J.:—

I am of the same opinion. The 25th section of the *Companies Act*, 1867, requires certain conditions to exempt shares from liability to be paid in cash. Now, those conditions are as follows: first, there must be at or before the date of the issue of these shares, a contract; secondly, that contract must be duly made in writing; and thirdly, that contract must be filed with the Registrar. Now, all these things must be done or must be in existence at or before the date of the issue. You cannot have a contract filed before the issue of the shares if it is not a contract till after the issue of the shares. You cannot have it duly made in writing at that time unless it has been made before the issue of the shares. All those things therefore must be done at or before that time.

Now, what we have here is this. There was a contract between the old and the new company which provided for the issue of these shares, but that was never registered, therefore that is out of the question. But a certain memorandum of agreement of the 28th of September, 1888, was filed. That purported to be between the new company and the several persons whose names and addresses are set forth in the schedule. Now, not one of those persons signed the agreement. Not one of those persons is shewn to have given any assent to the agreement until by the acceptance of the shares, after issue, they may be said to have concurred in the agreement. Therefore it appears to me there was at the time of the issue of the shares no contract between the parties on the terms of this instrument, still less was there any contract duly made in writing.

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(1) Law Rep. 1 Ex. 342.

(2) 2 C. B. (N.S.) 67.

Now we have been asked to attend to cases on the *Statute of Frauds*, but nothing can be more different than the language of this statute and the language of the *Statute of Frauds.* That is satisfied if the contract be in writing, or if the memorandum of the contract be in writing signed by the party to be charged therewith, but here the contract must be made in writing, by which I understand that both parties to the contract must signify their assent to the terms of it in writing, and that without going beyond the writing you can see the existence of the contract between the contracting parties. That is the ground on which it appears to me that we cannot convert this into a contract satisfying the language used by reason of the subsequent acceptance of its terms by some of the persons making the contract.

But then it is said that this was not an offer by the company, it was an acceptance by the company of an offer previously made to them. But the misfortune is that this document does not contain any writing stating the offer, it does not purport to be an acceptance of the offer, it proceeds on an entirely different footing. Therefore if it were the fact that there was any such offer (I agree there was not) that is not embodied in this writing, and therefore is not a contract duly made in writing.

I regret to have to come to this conclusion, because the document registered is an honest one and obviously discloses the real transactions between the parties.

Solicitors for all parties: *Snell, Son & Greenip.*

M. W.

In re SHEPHARD.
ATKINS *v.* SHEPHARD.

[1889 S. 3177.]

Equitable Execution—Appointment of Receiver—Abatement—Rules of Supreme Court, 1883, *Order* xvii., *r.* 1—*Order* xlii., *r.* 23.

S. being entitled to a freehold subject to a mortgage, a judgment creditor shortly before the death of *S.* applied for a receiver by way of equitable execution. The application was adjourned, and in the meantime *S.* died intestate. Two days after his death an order for a receiver was made without reviving the action or bringing the heir-at-law before the Court:—

Held, by the Court of Appeal, that the order was ineffectual, having been made after the death of *S.* and in the absence of any person to represent his estate.

What is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Assuming, therefore, that execution at law can be issued against the estate of a deceased person without any leave of the Court (as to which *quære*), a receiver by way of equitable execution cannot be appointed of the estate in the absence of the persons on whom the estate has devolved.

Order xvii., r. 1, does not keep an action alive as against the estate of a deceased party unless the estate has devolved on some one who is a party to the action.

Order of *Chitty*, J., affirmed.

THIS was an appeal from a decision of Mr. Justice *Chitty*.

On the 25th of October, 1888, *R. W. Cory* recovered judgment for £2032 and costs against *Mark Shephard & Son*, solicitors, the partners being *Mark Shephard* and his son *Herbert*. The costs were taxed on the 17th of November, 1888.

In July, 1889, *Cory* discovered that *Mark Shephard* was entitled to certain freehold property subject to a mortgage, and on the 3rd of August took out a summons in *Cory* v. *Shephard* to have a receiver appointed over that property. The summons was brought on in August before Mr. Baron *Pollock*, and adjourned to the 15th of that month. On that day the solicitor for *Cory* pressed for an order, but *Shephard's* clerk producing a certificate that *Shephard* was seriously ill, Mr. Baron *Pollock* adjourned the summons to the 22nd.

Shephard died on the 20th of August. On the same day *Atkins* commenced this action on behalf of himself and all other the creditors of *Shephard* against *Shephard's* widow and *Stuart Shephard,* his heir-at-law, asking for a receiver until a legal personal representative was constituted, and for administration as soon as a representative was constituted. On the 21st of August Mr. Baron *Pollock,* in Chambers, appointed Mr. *Pratt* interim receiver in this action, with power to act at once, before his security had been given.

On the 22nd of August the adjourned summons in *Cory* v. *Shephard* came on again, no revivor having taken place, and the heir-at-law not being served. Mr. Baron *Pollock* appointed Mr. *Pratt,* upon first giving security, receiver of the rents, profits, and moneys receivable in respect of the interest of *Shephard* in the above-mentioned freehold property, subject to the rights of prior incumbrancers, the balances due from him to be paid towards satisfaction of the judgment debt. The order as drawn up appeared to be made in the presence of the Defendants, though one of them in fact was dead. Security was not given under this order.

On the 17th of September, 1889, letters of administration were granted to *Stuart Shephard* of the estate of *Mark Shephard.* The action was on that day discontinued as against the widow, and on the same day an order was made continuing the receiver until further order. On the 20th of September an order was made allowing the Plaintiff to continue the action against *Stuart Shephard* in the character of administrator. On the 25th of September, 1889, an order was made for administration of *Shephard's* estate and for continuing the receiver.

On the 25th of October *Cory* moved before Mr. Justice *Chitty* that the receiver might be ordered to appropriate all moneys received in respect of the rents of the above freeholds in or towards satisfaction of the judgment debt.

Mr. Justice *Chitty* refused the motion on the ground that as the receiver in *Cory* v. *Shephard* had not given security, he was not competent to act, and that if he were to qualify himself by giving security, he could not interfere with any receiver appointed in the administration action. His Lordship also expressed his opinion that the order for a receiver in *Cory* v. *Shephard* was *ultrà vires*, as it was made after *Shephard's* death, and in the absence of any person representing him. *Cory* appealed.

Romer, Q.C., and *Haldane*, for the appeal:—

The ground on which Mr. Justice *Chitty* mainly decided the case is displaced by the decision of the Court of Appeal in *Ex parte Evans* (1), which shews that when a receiver gives security his authority relates back to the time of the order appointing him.

[*Dibdin*, for the Respondent, said that this case had been overlooked below, and that the Respondent did not contend that the decision of Mr. Justice *Chitty* could be supported on the first ground.]

We say, then, that our order ought to prevail, and that having obtained equitable execution we have priority, for that an order for a general receiver in an administration suit is not intended to affect a receivership over particular property created for the purpose of giving equitable execution, and that our order was good as against any one but the interim receiver, whose office came to an end when a personal representative was constituted. Order XVII., rule 1, provides that an action shall not abate by the death of any of the parties.

[FRY, L.J.:—Could you in Chancery have got a receiver against the estate of a dead man who is not represented by any one before the Court?

COTTON, L.J.:—According to Order XVII. the action may not be gone; but is it not gone as against a dead person until he is represented?]

A judgment does not cease to be a judgment by the death of the defendant; it can still be enforced *ex parte*, and the obtaining a receiver in a case like this is a mere way of obtaining what is equivalent to execution at law. The Court can now by *Judicature Act*, 1873, s. 25, sub-s. 8, appoint a receiver whenever it is "just or convenient:" *Manchester and Liverpool District Banking Company* v. *Parkinson* (1).

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(1) 13 Ch. D. 252.

[COTTON, L.J.:—Under the *Common Law Procedure Act* was it not necessary to obtain leave to revive and to issue execution, and does not Order XLII., rule 23 (*a*) continue this?]

Apart from the *Judicature Act*, a receiver could have been obtained by bringing an action against the heir, and in a proper case could be appointed *ex parte*. The *Judicature Act* makes a fresh action unnecessary, and by Order XVII., rule 1, the receiver can be appointed in the pending action. In the case of *In re Parker* (2), a sole defendant having died after judgment for administration, a receiver was appointed *ex parte*.

[BOWEN, L.J.:—Is not *Eldridge* v. *Burgess* (3) against your construction of Order XVII., rule 1?]

In that case the right to sue had devolved upon some one not before the Court.

[FRY, L.J.:—Is not the application of the rule confined to cases where the devolution of title is on some one who is before the Court?]

In *Manchester and Liverpool District Banking Company* v. *Parkinson* the Court points out that it was not convenient in that case to appoint a receiver, but does not say there was want of jurisdiction, and the observations of Lord Justice *Fry* (4) tend to shew that there is.

Dibdin, for the Plaintiff, and *Kingdon*, for the Defendant, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*. A judgment for a sum of money had been obtained in an action of *Cory* v. *Shephard* in the Queen's Bench Division against *Mark Shephard* and his son. *Mark Shephard* was entitled to a freehold estate subject to a mortgage, and an application was made to Mr. Baron *Pollock* to appoint a receiver of the rents of this estate.

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(1) 22 Q. B. D. 173.

(2) 12 Ch. D. 293.

(3) 7 Ch. D. 411.

(4) 22 Q. B. D. 177.

Before the application was disposed of *Mark Shephard* died. Immediately after his death the action of *Atkins* v. *Shephard* for administration of his estate was commenced, and an order was made appointing an interim receiver. On the day following Mr. *Cory* obtained on his application an order appointing the same person receiver, on his first giving security. This order was held by Mr. Justice *Chitty* not to give Mr. *Cory* any priority as regarded the rents of the freehold estate. The learned Judge apparently decided the case on the ground that the order was ineffectual until the receiver had given security, the attention of the Court not having been called to *Ex parte Evans* (1) in this Court. It is admitted now that the ground on which he went was erroneous; but there is another point in the case. Was there any jurisdiction to make an order affecting the estate formerly belonging to *Mark Shephard*, when in consequence of his death the estate no longer belonged to him, and when no person interested in it was before the Court? Mr. Justice *Chitty*, though he did not decide the case on this ground, expressed an opinion that there was not. It was urged that there was, for that this was equitable execution and must follow the analogy of legal execution; that legal execution could be issued *ex parte* after the death of the judgment debtor, and that therefore there was no reason why equitable execution should not. But is this to be considered as equitable execution and as subject to the same objections only as legal execution, and, assuming that legal execution can be issued against the estate of a dead person without taking any intermediate step, a proposition to which I am not disposed to assent, does it follow that equitable execution can be so issued? In my opinion it does not. Confusion of ideas has arisen from the use of the term "equitable execution." The expression tends to error. It has often been used by judges, and occurs in some orders, as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law. Until recently nobody ever thought that an order for a receiver could be obtained in aid of a legal judgment unless there was a hindrance to obtaining execution at law. If any practice has grown up of granting such an order where there is no hindrance to obtaining execution at law it is a practice which has never been brought before the Court of Appeal, and which in my opinion is wrong. The obtaining a receivership order is not taking out execution, it is obtaining equitable relief by a subsequent order, which must be made against some one against whom the Court has jurisdiction to make an order. It cannot be made against the estate which formerly belonged to a dead man, but which as he is dead is no longer his, it must be made against his heir or devisee, and under such circumstances that the Court has jurisdiction over the heir or devisee. It is urged that the General Rules of Court, which have the force of an Act of Parliament, enable the Court to make the order in the absence of the heir or devisee, and Order XVII., rule 1, is relied on as having that effect. The father and his son *Herbert* here were both liable for this debt, and judgment was recovered against both. The rule in my opinion keeps the action alive as against the son who is living but not against the deceased father. In the case of devolution by death the action is kept alive by the rule with respect to the property only where it devolves upon a person who is before the Court. The action therefore in the present case is not kept alive as against the heir-at-law, who is not a party to it, and the right to make an order against what was the father's property but is now the property of the heir-at-law, is gone until the heir-at-law is before the Court.

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(1) 13 Ch. D. 252.

The decision of the Lord Justice *Fry* in *In re Parker* (1) was relied on. But in that case the plaintiff was entitled to take out letters of administration if no one else did so, and the Court having jurisdiction to appoint a receiver *pendente lite* an order for one was made there being a person before the Court who was entitled to take out administration and who undertook to do so. The order was made not for the purpose of enforcing any right, but merely for the interim protection of the property.

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(1) 12 Ch. D. 293.

It is quite new to me to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. It is against all principle to proceed against him until he has been brought before the Court, or all proper steps to bring him before the Court have been taken ineffectually. I think, therefore, that this receivership order was made *per incurium*, the Court having no jurisdiction to make an order against the heir in his absence, and the order of Mr. Justice *Chitty* must be affirmed.

BOWEN, L.J.:—

I am of the same opinion. A judgment had been obtained against *Mark Shephard* and his son *Herbert* in the Queen's Bench Division for a sum of money. *Mark Shephard* died, and so departed from the world and from the suit at the same time. Then the Plaintiff in the action in the Queen's Bench Division obtained *ex parte* an order for a receiver of the rents and profits of property which had been the property of *Mark Shephard*, but on his death had by operation of law passed to some one else. It is suggested that such an order may be made *ex parte*. It is startling to hear that an order can be made against property without any notice to the owner. It is urged that this can be done, because the appointment of a receiver is only equitable execution, that at common law execution could be issued without notice to any one, and that therefore equitable execution may be so issued. I doubt whether at common law execution can be issued without notice after the judgment debtor's death against the goods of his executor. There are certain statutory provisions allowing execution to issue by leave of the Court against the goods of the executor, but I believe that notice to the executor is required to obtain such leave.

But even supposing that legal execution could be issued *ex parte*, it does not follow that what is called equitable execution can be so issued. Equitable execution is not like legal execution; it is equitable relief, which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution. It would in my opinion be wrong to say that an order for a receiver can be made in the Chancery Division *ex* *parte* without any notice to the person whose property is to be affected. It is contended that Order XVII., r. 1, gives the Court power to make such an order; but I think that rule only kept the action alive as against the living son, not against the deceased father. Order XLII., r. 23, provides for various cases of execution, but does not apply to the present case, which is one of the appointment of a receiver; and if it did, there is nothing in it to warrant making the order *ex parte*.

FRY, L.J.:—

The Appellant's contention is that the appointment of a receiver is execution, that execution may be issued *ex parte*, and that therefore a receivership order may be made *ex parte*. Both the first two propositions require much consideration before they can be admitted.

The idea that a receivership order is a form of execution is in my opinion erroneous. A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff shewed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and therefore it was not execution. Moreover, the appointment of a receiver was an act requiring the exercise of judicial power on the part of the Court; the circumstances to which I have referred had to be proved before the Court would make the order. All these considerations tend to shew that the appointment of a receiver was not execution, but was equitable relief granted under circumstances which made it right that legal difficulties should be removed out of the creditor's way. It has often been spoken of by judges as "equitable execution," but I am afraid that this concise expression has led to the erroneous idea that the appointment of a receiver is a form of execution which can be obtained without shewing to the Court the existence of the circumstances creating the equity on which alone the jurisdiction arises.

Then, as regards the proposition that execution can be issued after the death of the judgment debtor against his estate without any notice, I confine myself to expressing great doubt whether it is correct. It is not necessary for me to give any opinion upon it, as the first point disposes of the case.

Solicitors: *R. J. Witty; Deacon, Gibson, & Medcalf; Mark Shephard & Son.*

H. C. J.

ALEXANDER *v.* SIMPSON.

[1889 A. 1167.]

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CHITTY, J.
Nov. 8.
C. A.
Nov. 27.

Company—Special Resolutions—Notice of Meeting.

The articles of association of a company provided that "seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting." Notice was given that an extraordinary general meeting would be held on the 12th of July at the hour and place therein mentioned for the purpose of considering, and if deemed advisable, of passing the resolutions set forth in the notice, and it concluded, "should such resolutions be duly passed the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting which will be held on Monday the 29th of July, at the same time and place":—

Held, by the Court of Appeal (affirming the decision of *Chitty*, J.), that the said meeting was invalid, for that though it was possible to put on the notice the construction that a meeting would be held on the 29th of July, whether the resolutions were passed on the 12th or not, the construction which an ordinary business man would put upon the notice would be that the meeting would be held only if the resolutions were passed at the first meeting; that the notice of the second meeting was therefore conditional, and, being bad when sent, could not be made good by the shareholders acquiring information *aliunde* that the resolutions had been passed at the first meeting.

THE *Lisbon-Berlyn Gold Fields* was incorporated as a company limited by shares. By the 52nd article it was provided as follows:—

"Seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting, but the non-receipt of such notice shall not invalidate the proceedings at any general meeting."

On the 3rd of July, 1889, the directors issued a notice that an extraordinary general meeting of the company would be held at the place therein named on Friday, the 12th of July, at two o'clock, for the purpose of considering, and if deemed advisable, of passing the subjoined resolutions. The first of the proposed resolutions was to the effect that it was expedient to reconstruct the company, and accordingly that the company should be wound up voluntarily, and that *C. P. Simpson* should be appointed liquidator. The second was that the liquidator should be authorized in accordance with the *Companies Act*, 1862, sect. 161, to sell and transfer (subject to due provision for dissentient shareholders) the undertaking, property, and assets of the company to a new company (to be formed) upon the terms contained in the scheme of reconstruction and draft agreement submitted to the meeting. The notice concluded, "Should such resolutions be duly passed the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday the 29th of July, 1889, at the same time and place."

The meeting of the 12th of July was held, and the resolutions were passed by a majority of more than three-fourths. A full report of the meeting appeared in the *Financier* of the 15th of July, 1889, and on that day the directors posted to each shareholder a copy of that newspaper with a mark placed against the report of the meeting, but did not give any notice that a meeting would be held on the 29th of July to confirm the resolutions.

The meeting was held on the 29th of July, and the resolutions were confirmed by the requisite majority. On the 10th of September, 1889, a new company was incorporated under the name of the *Lisbon-Berlyn Company, Limited,* for the purpose of acquiring the undertaking of the old company.

On the 13th of September this action by *L. C. Alexander*, on behalf of himself and all other the shareholders, except the Defendants, and by the company, against the liquidator and the directors, was commenced, seeking a declaration that the resolutions were not validly passed, and an injunction to restrain the

Defendants from carrying the resolutions into effect and from transferring the undertaking to any new company in pursuance thereof.

An injunction was applied for in September, but the motion was ordered to stand over till the sittings, and came on before Mr. Justice *Chitty* on the 8th of November, 1889.

Romer, Q.C., and *Bramwell Davis*, for the Plaintiff.

Rigby, Q.C., *Brice*, Q.C., and *J. T. Prior*, for the Defendants.

CHITTY, J.:—

The case of the Defendants is, that the statutory special resolution has been duly passed. The statutory special resolution is the creature of the statute of 1862; and there are certain essentials that are required for the due passing of such a resolution. The Plaintiffs attack the resolutions on various grounds, but there is only one upon which I shall proceed to give judgment. I am not going to give judgment upon the other questions argued, although as at present advised I am against the Plaintiffs on every other point. But if the Plaintiffs bring forward one objection which is fatal to the statutory resolution that will be sufficient to entitle them to the injunction which they ask for on the present occasion.

Now the Plaintiffs say that due notice was not given of the meeting which in fact took place on the 29th of July. The argument raises a question of general importance. There are some particular facts which apply to the case before me; but as I gather from the Defendants' argument, one great question is whether a conditional notice can be good or not. In my opinion a conditional notice that a meeting will be held is not a good notice. You must tell the shareholders or members of the company who are entitled to have the notice that a meeting will be held—not that the meeting will be held in a certain event, but that it will be held. Mr. *Rigby* has argued for the Defendants that the notice of the 3rd of July was not a conditional notice, but an absolute notice, and it is necessary to refer to the document of the 3rd of July in order to see whether his argu-

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ment can be maintained or not. The proposition to put it generally, which was intended to be placed before the shareholders by this document of the 3rd of July, was that there were two meetings to be held. The object was to pass a resolution which required two statutory meetings, and the subject matter of the proposed resolution was the winding-up of the company, and the dealing with the assets in a particular way. The notice was unquestionably a good notice of the meeting that was in fact held on the 12th of July. "Notice is hereby given of an extraordinary general meeting," &c. [His Lordship read the notice.] Then after stating the resolution, and that the copy of a certain scheme and draft agreement could be seen, the notice or document goes on: "Should such resolutions be passed the same will be submitted," &c. [His Lordship read the document.] Upon that the argument for the Defendants is that that is a notice absolutely that the meeting will be held on the 29th of July. In order to come to that conclusion I am asked to reject the words "Should such resolutions be duly passed." I think that that argument cannot be maintained. I think that those words with which the sentence commences do state a condition, and that the fair meaning, and the substance of this notice is, that should the resolution be passed, that is in the event of their being passed, the meeting will be held; and the distinction sought to be established in argument that those words, "which will be held," are words absolutely to be dissociated from the early part of the sentence is an argument that cannot be maintained.

Then I read this notice of the 3rd of July, 1889, upon its true and fair construction as a conditional notice of the second meeting—the meeting of the 29th, and upon the point as to whether a conditional notice is good or not I unhesitatingly express my opinion that it is not good. My observations are not confined to this particular company. Shareholders may be living in all parts of the world, and they are entitled to have the notice definite in order that they may make their arrangements definite. They may be in *Scotland*, *Ireland*, or on the Continent, or anywhere, and they have to make their arrangements to attend. How is a shareholder to make arrangements to come to a meeting when he has notice that a meeting will be held only in an uncertain event.

It is not necessary to pursue this matter further. Other illustrations could be given to shew that it would be a matter of the greatest detriment to shareholders in general, if it could be said that a conditional notice was a good one.

That being so the next point which arises is this. Have the company given notice to the shareholders that the resolutions were passed at the first meeting? If they had sent a second notice to the effect that the resolutions had been passed, referring the member receiving it to this document of the 3rd of July, that would have been sufficient; in other words, if they had said the resolutions have been passed, and we refer you to our previous notice stating that a meeting will be held on the 29th of July. That is not the case I have to consider. The case I have to consider is simply this, that the managing body, the directors and the secretary, having before them a report in a financial newspaper of what had taken place at the meeting sent, according to the evidence, a copy of the newspaper to every member of the company; and it is contended that that was equivalent to informing every member that the resolutions had been passed. Unquestionably if the member had received the newspaper and opened the newspaper, and read the part that was marked, and marked of course for the purpose of calling his attention to it, he would have seen somewhere in the report of the proceedings that the resolutions had been passed. Is that sufficient? In my opinion it is not. This is really a question of fact. Here what I say applies more especially to the particular facts of this case. A member of a company who receives a notice from the company in accordance with its articles may throw it into the waste paper basket if he chooses but at his own peril. Under the articles before me the notice has to be duly given, and duly served, and the statute only refers to the service of the notice. If it is sent by a prepaid letter—if the notice is sent and you prove the posting, then it is a misfortune in a case of this kind on the part of the member if he does not receive it, or if he is abroad and cannot receive it in due time to attend the meeting. That is quite immaterial. But although he may disregard it at his own peril, notices sent by the company—notices which are to affect him, must be something emanating from the company itself. Mr. *Rigby* argued that a casual conversation would be sufficient. I do not know how the 3300 shareholders could all be told of this in conversation; but he argued that a conversation would be sufficient to draw the attention of the members of the company to the fact that the resolution had been passed. If every member had known, possibly the Defendants could have maintained that case; but a man receiving a financial newspaper receives nothing at his own peril. He is not bound to look at it. He may throw it at once into the waste paper basket and disregard it; it would be a remarkable thing to say that you could give a notice in that way. Suppose this had not been a question of the statutory condition having been complied with, but of sending out a notice convening a meeting and nothing else, and the only thing that was done was that a copy of a financial newspaper was sent to every member, could it be maintained, in fairness and honesty, that that was a statutory notice? The newspaper contains many other things. The shareholder or member receiving it is not bound to read it through, or to read it at all; he can do as he thinks fit, and he does not on its receipt, act at his own peril.

And, moreover, to apply my remarks more to the case actually before me, it is not enough to send a notice in that way. Even if the shareholder has read it, I am not prepared to say it would be enough to say, "You read it in the newspaper," because that is only a statement by the reporter at the meeting, and reporters do make mistakes, as is shewn in the case before me, when reporting what took place. It is not the company who tells officially the member that the condition or the event has happened on which the meeting will take place; but the utmost that is said is that there is a statement in the newspaper that this thing occurred. Perhaps I have considered the argument in greater detail than is necessary. I hold as a matter of law that a conditional notice is not a sufficient notice, then I hold that there was no notice shewing that the condition had been performed, and that the meeting would, as a matter of fact, be held. So I decide the motion in favour of the Plaintiffs. It may be, of course, that after all this discussion the Defendants, having the majority, may be able to put the thing right, so that my injunction, which is only a temporary one, may hereafter be stayed. I grant the injunction, of course, until judgment or further order, and I give you liberty to apply, Mr. *Rigby*.

I have not said anything about various incidental arguments that were addressed to me, but the question of waiver cannot, of course, be raised for a moment.

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The Defendants appealed. The appeal was heard on the 27th of November, 1889.

Rigby, Q.C., and *J. T. Prior*, for the appeal :—

The question is whether this was a good notice of the second meeting under the 52nd article.

[FRY, L.J. :—How was a shareholder who was not present at the first meeting to know whether there would be a second meeting ?]

We sent a newspaper report of the first meeting to every shareholder.

[FRY, L.J. :—People are under no obligation to read the newspapers sent them.]

We contend that the notice, though not in an eligible form, gives sufficient notice of the second meeting. Grammatically, the words, "should such resolutions be duly passed," do not govern the words, "a subsequent extraordinary general meeting of the company which will be held on," &c. The notice of the second meeting is unconditional. It comes to this : "A meeting will be held at which if these resolutions have been passed they will be submitted for confirmation."

[BOWEN, L.J. :—If the resolutions are not passed the notice of the second meeting does not state any object of it. Is that a good notice ?]

Yes ; the meeting would be a good meeting, though it could not transact any business unless those resolutions came before it for confirmation.

[BOWEN, L.J. :—Here are two possible constructions, that the notice of the second meeting is conditional, or that it is unconditional; which would a business man reading the notice take ?]

The notice we say, if taken as a whole, is a sufficient notice that two meetings would be held, and a shareholder would not expect a further notice of a second meeting. The shareholders evidently took this view, for they attended the second meeting in large numbers, and there is no evidence that any one was misled. This is like an application after verdict. Many an objection which would be fatal if taken in time is cured by verdict. The shareholders are almost unanimous in approving what has been done; and to upset the resolutions now would throw the concerns of the company into utter confusion. If the notice had said, " If the resolutions are passed a meeting to confirm them will be held on the 29th of July," that, no doubt, would not have been a good notice; but what they say is, in substance, " A second meeting will be held on the 29th of July, and if the resolutions are passed at the first meeting they will be submitted to the second for confirmation;" and that, we say, is a sufficient notice.

Romer, Q.C., and *Bramwell Davis*, for the Plaintiffs, were not called upon.

BOWEN, L.J.:—

It is impossible for us to give effect to this appeal, and I am of opinion that it must be dismissed with the usual consequences.

The order appealed against is an order of Mr. Justice *Chitty* of the 8th of November, 1889, by which he granted an injunction at the instance of the Plaintiff, suing on behalf of himself and other members of the company—the *Lisbon-Berlyn Gold Fields, Limited*—to prevent the Defendants, who are the managing director and secretary and two of his colleagues, from carrying into effect resolutions which were passed at two meetings of the company held on the 12th and 29th of July, 1889. The application for an injunction is based on the proposition that one of these two meetings was not properly convened within the provisions of the articles of association of the company. The meetings in question were meetings governed by the 51st section of the Act of 1862, but it is not necessary for us to discuss that section.

The real point in this case is whether the 52nd of the articles of association of the company has been complied with in summoning these two meetings. No objection is taken to the validity of the first meeting. What we have to consider is whether the second extraordinary general meeting, that of the 29th of July, 1889, which it was proposed to hold in order to ratify the resolutions that were passed at the first, was properly convened by the notice which is before us. The 52nd article provides that "seven days' notice in writing specifying the place, the day, and the hour of meeting; and, in case of special business, the general nature of such business, shall be given to the members before every general meeting." The question which we have to determine is a question of the construction of the notice that was issued on the 3rd of July, 1889. That notice is a compound notice, the former portion of it is directed to the first of the two extraordinary general meetings, and the second portion to the extraordinary general meeting of the 29th of July, the validity of which is now in dispute. Mr. *Rigby* has asked us to put what may be called a benevolent construction upon this notice, so as to give validity to what was honestly and *bonâ fide* done at the second meeting, and which it perhaps may be injurious to the company to disturb. It seems to me, however, to be impossible for us to adopt the view that a benevolent construction ought to be put on commercial notices. What we have to consider is not what is the result of any particular construction, but what was the meaning which ordinary men of business would attribute to the notice at the time they received it. It is hardly necessary to dilate upon the difficulty in which we should be placed if we were to consider that such a document was capable of two constructions, one the proper construction to be put on it at the moment it is received, and another and subsequent construction of a more benevolent character that might be placed upon the document in the event by a Court of Law which was anxious not to disturb matters that had already passed. The test is, what is the fair business-like construction which business men in the position of shareholders would place on this document when they received it? And it is by applying that test that I propose to try the validity of this notice.

The part of the notice which relates to the second meeting is as follows: "Should such resolutions be duly passed" (that is the resolutions which it was proposed to bring before the first extraordinary general meeting) "the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday, the 29th of July, 1889, at the same time and place." If that paragraph is to be read as a notice that the subsequent extraordinary general meeting of the company would only be held on that day in the event of the passing of the resolutions at the former meeting, it is obvious that it would not be a good notice, because it would leave a shareholder who got the notice in ignorance whether or no the general meeting of the 29th of July was to be held. He would only know that it would be held in a particular contingency, that of the resolutions being passed: and the defect could not be cured by his subsequently acquiring information *aliunde* that the resolutions had been passed. The point is not what the notice in time became, when it was perhaps too late for a valid notice to be given, but what it was at the time when it was received by the shareholders, and while there was still time to give a proper notice. Mr. *Rigby* has argued that this paragraph is capable of the construction that an extraordinary general meeting would, at all events, be held, and that the words, "should such resolutions be duly passed," only applied to what was to be done at that meeting when it took place. Of those two opposite constructions, which is the plain and businesslike one? Is this really a notice that an extraordinary general meeting would be held whether it was necessary to hold it or not, (for that is what Mr. *Rigby's* construction comes to), or is it to be read in the more obvious way that if the resolutions which required a subsequent extraordinary general meeting to confirm them were passed at the former meeting, then, and in that event only, the second meeting would be held? It seems to me that a shareholder would consider that the extraordinary general meeting of the 29th of July was only to be held in the event of its being necessary, that is to say in the event of the resolutions being passed at the former meeting, because if he took any other view he would have to conclude that the directors of the

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company were summoning a meeting which, in one contingency, would bring the shareholders from all parts of *London*, or, for anything I know, from all parts of *England*, for no purpose at all, and when there was no business at all to be transacted. It does not seem to me to be business-like or reasonable to suppose that it was intended by this general notice, that an extraordinary general meeting should be held on the 29th of July, whether there was any business for it or not, when you find words which, in their ordinary grammatical sense, imply that the extraordinary general meeting of the 29th of July would only be held in case it was wanted.

I regret very much that our decision will cause a great deal of inconvenience and trouble in the affairs of this company; but it is not a mere technical matter. The difficulty cannot be properly described as a technical one. The construction of a notice convening an extraordinary general meeting of a company is not a technical point, and I agree entirely with what Mr. Justice *Chitty* has pointed out—the extreme importance that these notices should be so plain that those who run may read, and that they should be construed in a sense in which business men to whom they are addressed would understand them. Great as may be the inconvenience arising from our decision, we are bound to put on this document the true construction, the construction which all the shareholders would put upon it at the time they received it, and to dismiss this appeal with costs.

FRY, L.J.:—

The Lord Justice has so fully expressed my views as to the construction to be put on this notice, that I could not usefully add anything to what he has said, except to express my entire concurrence.

Solicitors for the Plaintiffs: *Snell, Son & Greenip.*
Solicitors for Defendants: *Powell & Burt.*

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TURNOCK *v.* SARTORIS.

[1888 T. 616.]

Agreement to refer to Arbitration—Staying Proceedings—Common Law Procedure Act, 1854 (17 *&* 18 *Vict. c.* 125), *s.* 11 [*Revised Ed. Statutes, vol. xii., p.* 411].

By a lease the lessor covenanted to supply the lessee with a certain quantity of water per day. The lease contained a clause providing that if any difference should arise between the parties touching the lease or anything therein contained, or the construction thereof, or in any way connected with the lease or the operation thereof, it should be referred to arbitration. Some years afterwards, disputes having arisen between the parties as to the water supply, a written agreement was entered into binding the lessor to take certain steps with a view to securing a better supply, and in some points varying the rights of the lessee as to the supply. Afterwards the lessee commenced an action alleging that the steps mentioned in the agreement had not been taken, and also alleging that the lessor had not supplied the stipulated quantity of water, and claiming an inquiry as to the damages sustained by the Plaintiff "by reason of the matters aforesaid." The Defendant moved to stay proceedings in the action, and refer the dispute to arbitration.

Held, by the Court of Appeal, that in the action the Plaintiff could claim damages for breaches of the agreement as well as for breaches of the covenant in the lease, and that as the arbitration clause only applied to matters arising under the lease, it did not cover the whole subject-matter of the action.

Wade-Gery v. *Morrison* (1) distinguished.

Held, further, that it would not be right to split up the action by referring to arbitration the matters arising under the lease, leaving the action to proceed as to the other matters, and that even if the arbitration clause could be construed so widely as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease :—

Held, therefore (affirming the decision of *North*, J.), that the application must be refused.

BY indenture of lease dated the 21st of June, 1870, *Sartoris* demised to one *Jenkins* for sixty years two pieces of land at *Llanelly*, with a factory which was to be converted into works for the manufacture and coating of iron, *i.e.*, the manufacture of what are ordinarily called tin plates. The lessee covenanted (*inter alia*) that he would before Lady Day, 1871, construct upon the land a reservoir of at least two acres in extent and at least six feet deep, and the lessor covenanted that he would within a month after its completion lay down all apparatus necessary for supplying it with water, and would provide and by means of such apparatus cause to be delivered into the reservoir such a quantity of water as would enable the lessee by means thereof and with the aid of the water for the time being in the reservoir to furnish the manufactory and works with the necessary supply of water for the purposes of the business, such supply not to exceed 110,000 gallons per day. The lease contained a clause providing "that if any dispute, question, difference, or controversy shall arise between the said parties to these presents, their respective heirs, executors, administrators, or assigns, touching these presents or any clause, matter, or thing herein contained, or the construction hereof, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or liabilities of either party in connection with the premises then and in every or any such case, the matter in difference shall be referred to two arbitrators or their umpire pursuant to and so as with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the *Common Law Procedure Act*, 1854, or any then subsisting statutory modification thereof."

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(1) 37 L. T. (N.S.) 270.

Jenkins duly made the reservoir, and before 1880 his interest under the lease was assigned to the Plaintiff with the benefit of the lessor's covenants.

The water supply to the reservoir came from two reservoirs belonging to *Sartoris*, and called the upper reservoir and the second reservoir. In 1884 the Plaintiff complained, *inter alia*, that *Sartoris* had not supplied sufficient water, and commenced an action against him, in which on the 15th of June, 1885, he obtained a judgment directing an inquiry as to damages.

On the 7th of November, 1885, a written agreement was entered into between the Plaintiff and *Sartoris*, by which it was agreed (1) that *Sartoris* would forthwith make all necessary exertions to obtain the requisite easements for laying a new line

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of six-inch pipes by a less circuitous route than the present, and by the nearest available route from the upper reservoir to the works. (2.) That *Sartoris* would within three months lay or allow the Plaintiff to lay along the route so obtained, or failing that, then along the present route, a line of iron six-inch supply pipes from the upper reservoir, and having a connection with the second reservoir direct to the lower reservoir or the works, at which, or other convenient point, the Plaintiff might connect any service pipes for the distribution of the water. (3.) The expenses of the work to be borne by the parties equally, but the easement to be obtained at the expense of *Sartoris.* (4.) The new line of pipes to be kept in repair by the Plaintiff, the pumping stations and machinery reservoirs and a certain line of pipes to the upper reservoir by *Sartoris.* (5.) The Plaintiff was to undertake the whole charge of the waterworks upon the terms therein mentioned if required by *Sartoris.* (6.) Related to an allowance for expenses of the waterworks. (7.) If *Sartoris* elected to avail himself of the fifth clause, then after such election and during the continuance of the agreement save as thereinafter provided, *Sartoris* was to be absolved from any claim or liability under the covenant in the lease as to the supply of water, the Plaintiff accepting the arrangement mentioned in clause 5 in lieu of the covenant. Provided always that *Sartoris* should be liable to maintain such a supply of pure water as would enable the Plaintiff by means of the waterworks to pass a quantity not exceeding 110,000 gallons per day down to the works. (8.) Gave power to the Plaintiff to terminate the agreement on certain terms.

In April, 1888, the Plaintiff commenced this action against *Sartoris. Sartoris* died in November, 1888, and in February, 1889, the action was revived against the present Defendants, his executors and trustees, to whom an amended statement of claim was delivered in March, 1889. By paragraph 8 the Plaintiff alleged that since the date of the agreement of November, 1885, neither *Sartoris* nor the Defendants had made any attempt to obtain, and they had not obtained the requisite easement for laying the new line of six-inch pipes by the nearest available route from the upper reservoir to the works—though such easement could no doubt have been obtained. That *Sartoris* had elected himself to carry out the works mentioned in the second clause, but failed to do so. That he also failed to furnish the Plaintiff's reservoir so as to enable the Plaintiff to furnish, and he neglected himself to furnish, the works with a necessary supply of water for the purposes of the business, though the necessary supply had never exceeded 110,000 gallons per day. By par. 10 he alleged that by reason of the insufficiency of the supply of water to the Plaintiff's works the Plaintiff had suffered, and still continued daily to suffer, considerable damage in the manufacture of tin plates. The Plaintiff claimed an inquiry "as to the damages sustained by the Plaintiff by reason of the matters aforesaid," judgment for the amount if the Defendants admitted assets, and administration if they did not.

On the 26th of November, 1889, the Defendants took out a summons asking that all further proceedings in the action might be stayed pursuant to sect. 11 of the *Common Law Procedure Act*, 1854. Mr. Justice *North* in Chambers refused the application.

The Defendants appealed.

Crackanthorpe, Q.C., and *S. Woolf*, for the Appellants:—

We contend that no relief is sought by the Plaintiff under the agreement of November, 1885. The matters in par. 8 of the statement of claim are merely brought in as a matter of history; the claim for damages is under par. 10, which states a deficient supply of water, and is founded solely on the covenant in the lease. The arbitration clause therefore covers the whole subject-matter of the action, and the case ought to be referred under the *Common Law Procedure Act*, 1854, s. 11. Supposing, however, that the question in dispute partly arises under the agreement the main question in dispute ought to be referred, leaving the action to proceed as to anything else. The case is one infinitely more fit for arbitration by an expert than for trial in Court. But in fact questions arising under the agreement are within the arbitration clause: *Wade-Gery* v. *Morrison* (1). The arbitrator can decide what questions are within the reference: *Willesford* v. *Watson* (2).

(1) 37 L. T. (N.S.) 270.

(2) Law Rep. 8 Ch. 473.

[*Cozens-Hardy*, Q.C., referred to the observations on *Willesford* v. *Watson* (1) in *Piercy* v. *Young* (2).]

[COTTON, L.J.:—If questions on the agreement are not within the arbitrator's powers ought we to have the action tried as to part by an arbitrator, and as to part by the Court?]

The Court will exercise its discretion according to the circumstances of each case, and here the case is one where a reference is far the best mode of trial.

Cozens-Hardy, Q.C., and *H. Terrell*, for the Plaintiff, were not called upon.

COTTON, L.J.:—

This is an appeal against the refusal of Mr. Justice *North* to stop the action and send the matters in dispute to arbitration, and it seems to me to involve two questions, first, whether the whole of the matters in dispute come within the clause of arbitration, and then, if that is so, whether there has been a proper exercise of the discretion of the Court in saying that the matters ought not to be referred?

The Plaintiff claims under a lease granted in the year 1870, which contained a covenant by the lessor, whom the Defendants represent, to supply a certain quantity of water to the demised premises. Disputes arose about the supply of water, and in the year 1885 there was an agreement entered into which, in my opinion, cannot be read as part of the agreement contained in the lease, but was a subsequent agreement between the parties imposing upon the lessor certain fresh liabilities, and to some extent modifying the rights of the Plaintiff. Before the agreement the Plaintiff had brought an action under the lease only, but in my opinion he brings his present action for alleged breach both of the lease and of the subsequent agreement. It was argued by Mr. *Crackanthorpe* that the action was brought only in respect of the matters referred to in clause 10, and that the Plaintiff thereby confines himself to a breach of the covenant in the lease as a ground of action. In my opinion that is wrong. Clause 8 distinctly refers to breaches of the contract contained in the

(1) Law Rep. 8 Ch. 473.

(2) 14 Ch. D. 200, 208.

agreement, and although par. 10 might be held to refer only to breaches of the covenant in the lease, he expressly claims damages sustained "by reason of the matters aforesaid," so that he cannot be precluded from claiming damages in respect of all matters previously referred to in the statement of claim, whether mentioned in clause 8 which refers to breaches of the agreement, or mentioned in clause 10 which refers to breaches of the covenant contained in the lease. Now what is the Defendants' case. They say that there is a clause in the lease which applies to the disputes referred to in par. 10 of the statement of claim and is as follows: "Provided always and it is hereby agreed and declared that if any dispute, question, difference, or controvery shall arise between the said parties to these presents or their respective heirs, administrators, or assigns touching these presents" (that is—the lease), "or any clause, matter, or thing herein contained" (that is—contained in the lease), "or the construction hereof or any matter in any way connected with these presents or the operation hereof, or the rights, duties, or liabilities of either party in connection with the premises then and in every or in any such case the matter in difference shall be referred. . . ." That to my mind simply refers to questions arising under the lease alone, and does not extend to all questions arising as to property included in the lease, and I therefore hold that the clause of reference to arbitration does not include all the matters that may arise under the subsequent agreement.

The case of *Wade-Gery* v. *Morrison* (1) was referred to in support of the contrary view, but that case was entirely different from the present. In that case there were two contemporaneous agreements, one of which contained, and the other did not contain, a stipulation for reference to arbitration, and the learned Judge decided that those two agreements must be treated as together forming one agreement, and that therefore the clause as to reference to arbitration which was found only in one of the two parts of that agreement was to apply to matters arising under either of the documents which, taken together, made up the agreement. That is entirely different from the present case.

(1) 37 L. T. (N.S.) 270.

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Then it was contended that at all events the question arising under the lease was the principal matter in dispute, and that it ought to be referred, leaving the action to proceed only as to matters not arising under the lease. I think that such a course would not be right. It cannot be right to cut up this litigation into two actions, one to be tried before the arbitrator, and the other to be tried elsewhere. Even if the arbitration clause should be construed so as to include all matters in respect of which damages are claimed by the Plaintiff, yet I should not think it right to refer the case to arbitration, because there are questions arising as to the construction of the agreement and its effect on the provisions of the previous lease, and these questions would not come within the powers of the arbitrators. I think it would not be reasonable to refer the case to an arbitrator who could only deal with the questions arising under the lease, and would not be competent to deal with other questions which might arise under a reference referring to him all matters which are in difference between the parties. Whether or not it will be reasonable, when the Plaintiff knows what the defence put in by the Defendants is, to refer the whole matter, is another question.

BOWEN, L.J.:—

I am of the same opinion, and I can add little to what my learned Brother, Lord Justice *Cotton*, has said. The only word I will add is to recommend that as soon as the defence has been put in the parties should consent to the cause being tried by an official referee. I think the case is one which it is the duty of the solicitors on both sides to refer, otherwise there will be a double expense and a double litigation.

FRY, L.J.:—

I am of the same opinion. It appears to me to be reasonably plain that the arbitration clause does not cover all the matters in dispute in the action.

After what has been said, especially by Lord Justice *Bowen*, I cannot help adding a word or two on the subject. I view with very considerable regret the number of cases in which the Court is called upon to try the matter twice over, viz., to try the question whether there ought to be an inquiry as to damages, and then to try the matter again upon an inquiry as to what the damages are. I think, so far as it is possible, that those double inquiries ought to be avoided.

Solicitors for Plaintiff: *Bridges, Sawtell, Heywood, Ram & Dibdin*, agents for *Rees & Edwards, Llanelly.*

Solicitor for Defendants: *Oliver Green.*

H. C. J.

CHITTY, J.

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Oct. 29, 30;
Nov. 7.

NEATH BUILDING SOCIETY *v.* LUCE.

[1886 N. 1023.]

Building Society—Power to borrow—Mortgage—Amount for time being secured by Mortgage—Building Societies Act, 1874 (37 *&* 38 *Vict. c.* 42), *s.* 15, *sub-s.* 2 [*Revised Ed. Statutes, vol. xvii., p.* 210].

In ascertaining the amount for the time being secured to a building society by mortgages from its members within the meaning of the *Building Societies Act,* 1874, s. 15, sub-s. 2, such amount is not to be limited merely to the amount of principal secured, but covers all loans due on the members' securities at the time of the loans to the society, whether for principal, or interest, or fines, or otherwise, and all instalments not then accrued due, but secured by the mortgage and outstanding.

In ascertaining the amounts advanced out of an *ultrà vires* loan on security the whole amount secured is to be included, although a commission was charged for the advance and deducted from it.

THIS was an action brought by the official liquidator of the *Neath Permanent Benefit Building Society* in the name of the society to set aside certain mortgages which had been executed by the society in favour of the Defendants on the ground that the mortgages were unauthorized and invalid as against the society.

The rule of the society with regard to borrowing powers was identical with sect. 15 of the *Building Societies Act,* 1874, which so far as is material is as follows:—

"With respect to the borrowing of money by societies under this Act, the following provisions shall have effect:—

(1.) Any society under this Act may receive deposits or loans, at interest, within the limits in this section provided, from the members or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society.

(2.) In a permanent society the total amount so received on deposit or loan and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members."

By the rules of the society it was provided that the society might retain out of the advances to the members a premium which should in no case exceed the sum of £10 per share of £100, and it was the invariable rule of the society in carrying out its business to retain a premium of £10 per cent. on the shares advanced.

It appeared that the moneys which the society had borrowed upon the security of the mortgages impeached in this action were applied in advancing members.

After the pleadings in the action were closed an order for the following preliminary accounts and inquiries was made:—

(1.) What was the amount secured to the Plaintiff society by the mortgages from its members in the pleadings mentioned?

(2.) What was the amount received by the society on deposit or loan and not repaid by them?

(3.) Whether any and, if any, what parts of the several sums secured by the said mortgages were applied and when respectively—

  (*a.*) In payment of any and what debts or liabilities of the society properly payable;

  (*b.*) In making any and what advances to members of the society, and what securities were obtained thereby?

Before the Chief Clerk made his certificate, it was agreed between the parties and subsequently ordered that the following questions of law arising out of the accounts and inquiries should be set down and argued:—

(1.) Upon what principle is it to be ascertained what was the amount secured to the society by mortgages from its members within the meaning of sect. 15 of the *Building Societies Act*, 1874?

(2.) Whether in ascertaining the amounts of the advances made by the society out of the moneys advanced on the security of the mortgages in the pleadings mentioned the premiums at the rate of £10 per cent. retained by the society out of the amount secured by the mortgage obtained by the society by means of such advances ought or not to be included in and treated as part of the advances so made?

The above questions now came on for argument.

Sir *H. Davey*, Q.C., and *J. G. Wood*, for the official liquidator:—

On the first question we say the term "amount secured by mortgage," means only the principal money due on a security, and does not include interest, fines, &c.; if it did do so a society of this kind would be enabled to increase its borrowing powers by allowing its mortgagors to fall into arrear with their interest.

We contend on the second question that the right of the Defendants to a lien on the securities must be limited to the amount actually advanced, that is to say, to £90 on each £100 share.

Romer, Q.C., and *Levett*, for the Defendants:—

With regard to the first question the words of the Act of Parliament are clear and distinct, and no limit can be put on the ordinary and grammatical meaning of the words. "Amount secured" means amount outstanding, including fines in arrear and prospective interest. In *Laing* v. *Reed* (1), where the rule as to the borrowing power contained the same words, "amount for the time being secured," Lord *Hatherley* in his judgment used the term "amount that may be outstanding."

On the second question we submit that the lien is not to be limited to the sum actually advanced, and we rely on *Mainland* v. *Upjohn* (2), where in taking the account in a redemption action the Court allowed the mortgagee sums actually deducted by him for commission or bonus at the times of making the advances.

Byrne, Q.C, and *Chadwyck Healey*, for a party in the same interest.

Sir *H. Davey*, in reply:—

In sect. 40 of the Act, which relates to the making of annual audits and statements of the funds of societies, the words "the balance due or outstanding on their mortgage securities (not including prospective interest)" are used, which shew that arrears of interest already due were to be included; but no such words occur in sect. 15.

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(1) Law Rep. 5 Ch. 4, 9.

(2) 41 Ch. D. 126.

In the case of *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks, & Co.* (1), sums paid by the society to advanced members were held to include bonus.

CHITTY, J. (after referring to the terms of sect. 15, sub-sect. 2, continued):—

In this sub-section two terms are compared, the first being the sum received on deposit or loan and not repaid. On this no question is raised. Assuming the society to have received in the past £100 and to have repaid a portion, then the balance would be this first term. This term involves no computation of interest whatever on the amount received. Whether or not some interest was owing on the £100, the amount received would merely be the £100. About that there is no question.

Then this term has to be compared with the other mentioned in the sub-section, the amount for the time being secured to the society by mortgages from its members, two-thirds of which is the limit of the borrowing power of the society. The point is as to the meaning of the words "amount secured by mortgage," and but for the argument, I should have felt no difficulty in stating that the expression must be taken according to its natural meaning, and even after the argument I cannot say that I entertain any doubt as to the meaning of the Legislature's language.

The Plaintiff's argument is that the meaning of the term "amount secured" must be interpreted so as to exclude any interest owing on the security. In the simple case of the society having at the time when it proposes to receive money on loan a mortgage for £100 payable in six months with interest at 5 per cent., payable half yearly, and where the six months having just elapsed, £2 10*s.* is due for interest, the Plaintiff says that the interest is not included in the amount secured. But why not? If the question be asked, either in a popular or legal form, the answer would be that the amount consists of principal and interest, that is, £102 10*s.* And supposing also a fine, say of

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(1) 29 Ch. D. 902.

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10*s.*, due for non-payment of the interest, then the amount secured would be £103. I am unable to give any other answer to the question. Indeed the Plaintiff's argument, if pushed to its logical conclusion, would require that a mortgage for £100 just given by a member should be discounted and reduced to its present money value, that is to say, that the "amount secured" means the present money value of what is owing on the security, and that because it is argued there must be some relation between the two terms which have to be compared—the borrowed money and the amount owing on the security. But the Legislature has not expressly said that there must be any such relation. It may well be that, as the principal due on the mortgage is not repayable for six months, the society would not necessarily have during the currency of a loan any money in hand on a given security, and the discounting of the principal cannot possibly have been intended by the Legislature. In reality, the Legislature had no intention of comparing in the section the principal alone, but was putting the principal of the loan against the amount secured, leaving a margin of one-third, which it supposed would be a sufficient protection to the lender.

Section 40, which provides for a balance-sheet, has also been relied on; but the account therein mentioned is to include not merely the principal of the loan but has to state the amount due to depositors and others for loans which would of course include the interest. The language of the Legislature is precise; it is not the "amount secured," but the balance due or outstanding upon the mortgage securities not including prospective interest. And this language, whilst not affecting that of sect. 15, which is plain, is adverse rather than favourable to the Plaintiff's argument, because it shews that the Legislature had present to it the fact that a building society's mortgages were generally payable by instalments, and necessarily involved prospective interest, and it provides that, in ascertaining how the society stands with a view of disclosing profits, prospective interest is to be excluded. In 1874, when the Act was passed, the case of *Laing* v. *Reed* (1), had decided that under a limited borrowing power a building society is entitled to borrow, and, curiously enough, the rule of

(1) Law Rep. 5 Ch. 4, 9.

the society in that case was expressed in very much the same language as that of this section, namely, "the amount for the time being secured by the mortgages to the society;" and Lord *Hatherley*, in the course of his judgment, translates this term into "the amount that may be outstanding upon mortgages." I do not found my decision on this *dictum*, but following it, I decide this case unfavourably to the Plaintiff. Again, in the case of a mortgagor coming to redeem his mortgage, which in the case of this society he has the power to do, though not at a fixed rate of discount, but as the actuary acting under the rules may decide, provided the rate be not less than 2½ per cent., it would be impossible to suppose that, for the purpose of this sect. 15, which was intended to lay down a working rule, such a right as this, which might never be exercised, was to be taken into account on every occasion when the society was borrowing money where the mortgages contain a power of sale which is exercised. The case of *Matterson* v. *Elderfield* (1) decided that a society is entitled to take at once the whole amount of the future instalments due without allowing any discount whatever. It is not to be supposed that what was intended to be a simple rule in the society's business should be complicated by matters of this sort. It is said that by deciding against the Plaintiff I shall be enabling societies of this kind to increase their borrowing power by allowing their mortgagors to fall into arrear. If that be the result of the Act, the result must follow; but I think the suggested danger is theoretical and not practical, for building societies are charged with being rather hard on their mortgagors and Acts of Parliament are not framed on the principle nor should they be construed on the footing that men will not perform their duty, for the suggestion would amount to misconduct on the directors' part. I must answer the first question by declaring that the amount is not to be limited merely to the amount of principal secured, but covers all loans due on the members' securities at the time of the loans to the society, whether for principal or interest, or fines or otherwise, and all instalments not then accrued due, but secured by the mortgage and outstanding,

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(1) Law Rep. 4 Ch. 207.

The second question arises in working out the equity of the person who has lent to the society sums in excess of their borrowing power. Such sums it is clear he cannot recover on the contract of loan, but it is also established that he has an equity of subrogation which is expressed by Lord *Selborne* in *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks, & Co.* (1) as the right to be repaid such portion of the amount lent as went to pay the legitimate debts of the society. To this extent the lender is entitled to stand in the shoes of the creditors. But that case also contains a further illustration of this right of the lender. If the society has made advances to members out of the amount lent, and obtains securities in respect of these advances, then the lender is entitled also to have the benefit of these securities.

The exact point now raised is this: advances were made by the society to members, but as the applicants for advances were numerous the society made a profit out of the transaction by putting the advances up to competition at a limit of 10 per cent. discount, the result being that the advanced member paid £10 for the right to the advance. It is argued that in working out this right of subrogation the point to consider is how was the lender's money applied and that it was applied to the amount only of £90 in every £100. On the other hand it is argued that there was a distinct contract between the society and its members for an advance of £100, the right to have the loan being purchased for £10, which by the rules of the society is deducted from the advance.

In my opinion the right mode of working out the equity is to treat the advance as being £100, and to calculate the right of subrogation accordingly. But the case does not stop here, for, in fact, the members' security is given neither for £100 nor for £90, but for a number of instalments. Now, in the case of *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks, & Co.* (2), the Vice-Chancellor of the Duchy of *Lancaster* gave the bankers the benefit of all sums received by the society from advanced members by way of bonus, &c., subject, however, to the costs of winding up, and to mortgages and charges to the society in respect of advances out of its proper funds. This limitation was,

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(1) 22 Ch. D. 61.

(2) 29 Ch. D. 902.

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however, struck out by the Court of Appeal. It is true the exact point as to the bonus does not appear to have been argued before them, but the ground on which they proceeded is stated (1) to be that "we treat the mortgages given to secure sums lent out of money advanced by the bankers as property which they are entitled to claim, that is, as their property." That is to say, the security given by the advanced member is to be treated as the property of the *quasi* lender. Though in the case before me this sum was only £90, it purchased the right to a security for £100.

On these grounds, therefore, I hold that the question must be answered so as to give the *quasi* lender the benefit of the £100, that is to say, that the advance is not to be treated as diminished by 10 per cent.

Solicitors: *Howell Thomas*, for *S. T. Evans, Neath; Prior, Church & Adams*, for *Meade-King & Bigg, Bristol; Richard White*, for *Hartland & Isaac, Swansea.*

G. M.

DE FRANCESCO *v.* BARNUM.

[1889 D. 1890.]

CHITTY, J.
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Nov. 22.

Infant — Apprenticeship Deed — Covenant to serve — Validity of Contract — Negative Covenant—Injunction to restrain Breach.

By an apprenticeship deed between an infant, her parent, and the master, an infant was bound apprentice for a term of seven years to be taught stage dancing upon certain terms, by one of which the infant purported to bind herself not to contract or accept any professional engagement during the said term without the consent of her master: the deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements during the said term, in return for which the infant's services were, during this period, to be entirely at the disposal of the master, and she was to enter into no professional engagement without his consent. The infant having accepted an engagement to perform for the Defendant *B.* before the expiration of the said term without the master's consent, application was now made for an interim injunction to restrain the infant from performing, and the Defendant *B.* and the parent from inducing or allowing her to perform, in violation of the terms of the apprenticeship deed:—

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(1) 29 Ch. D. 912.

Held, on the authority of *Gylbert* v. *Fletcher* (1), that inasmuch as no action could be brought against an infant on a covenant to serve, the negative clauses in this apprenticeship deed could not be enforced by injunction, and that the application must be refused both as against the infant and the other Defendants.

Fellows v. *Wood* (2) considered and distinguished.

MOTION.

This was an application by the Plaintiff, *Giuseppe Venuto de Francesco*, a teacher of stage dancing, for an interim injunction to restrain the Defendants, *Phineas T. Barnum* and *S. A. de Parravicini*, from inducing or allowing the Defendants, *Ada Parnell* and *Helen Maude Parnell*, the infant daughters of the Defendant *Elizabeth Parnell*, to perform as stage dancers at *Olympia*, in *Kensington*, without the full written permission of the Plaintiff, and also to restrain the Defendants *Ada Parnell* and *Helen Maude Parnell* from performing and the Defendant *Elizabeth Parnell* from allowing them to perform at *Olympia* or otherwise, without the consent of the Plaintiff, in violation of certain indentures of apprenticeship of the 6th of December, 1886.

By an indenture of the 6th of December, 1886, made between the Defendant *Ada Parnell*, therein stated to be an infant aged twelve years, and thereinafter called the said apprentice, of the first part; the Defendant *Elizabeth Parnell*, widow, thereinafter called the parent, of the second part; and the Plaintiff of the third part, after reciting the agreement for apprenticeship, it was witnessed: "That in pursuance of the said agreement in this behalf the said apprentice, by and with the consent of the parent, doth put herself apprentice to the said *G. V. de Francesco*, to learn his art, and with him (after the manner of an apprentice) to serve from the 6th day of December, 1886, until the full end and term of seven years from thence next following, and to be fully complete and ended, during which term the said apprentice her said master faithfully shall serve, his secrets keep, his lawful commands everywhere obey. She shall do no damage to her said master, nor see it to be done of others, but that she, to the utmost of her power, shall let or forthwith give warning to her said master of the same. She shall not waste the goods of her said master, nor lend them unlawfully to any. She shall not contract matrimony within the said term. She shall neither contract professional engagements nor accept such unless with the full written permission of her said master. She shall not absent herself from her said master's service unlawfully, but in all things as a faithful apprentice she shall behave herself toward her said master and all his during the said term. And the said *Giuseppe Venuto de Francesco*, in consideration of the faithful services of the said apprentice in the art of chorography which he useth, by the best means that he can shall teach and instruct, or cause to be taught and instructed, his said apprentice during the said term, but subject in all respects to the stipulations hereinafter mentioned." The deed then contained mutual covenants between the parent and the Plaintiff that the Plaintiff, in conjunction with qualified assistants, would instruct the said apprentice in the higher branches of the chorographic art for the term of seven years, and would make certain payments to the said apprentice, ranging from 6*d.* to 1*s.* per night, for all dancing engagements in *London* and the suburbs during the said term, with a right to engage the said apprentice for performances in *America* or any colonial or foreign state, upon providing board and lodging and 5*s.* a week during such last-mentioned engagement; that "the services of the said apprentice shall be entirely at the disposal of the said *G. V. de Francesco*, and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing" of the Plaintiff. The other covenants provided that the said apprentice should take and receive daily lessons, and conform to the rules of the theatre where she should be engaged; that the parent and the apprentice should conform to all the requirements of the *Education Acts*, and furnish the Plaintiff each month with a certificate that the apprentice's scholastic obligations had been strictly adhered to. The last clause provided that, in the event of the non-fulfilment by the parent of any of the terms of the deed, or if, amongst other things, the said apprentice should misconduct herself in or out of school, or decline the Plaintiff's engagements, or should accept any engagement without having previously obtained the written consent of the Plaintiff, or practise the art of stage dancing under the direction of any other teacher, the Plaintiff might, by notice in writing to the parent, determine the apprenticeship, and the parent should thereupon pay to the Plaintiff the sum of £50 as liquidated damages. This indenture was executed by the apprentice and the parent; and another indenture, in precisely similar terms, was on the same day also executed by the Defendant *Helen Maude Parnell*, then aged fourteen years.

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(1) Cro. Car. 179.

(2) 59 L. T. (N.S.) 513.

In August, 1889, the Defendants *Ada* and *Helen Maude Parnell* entered into arrangements with the Defendant *Parravicini*, as the agent for the Defendant *Barnum*, with a view to performing as stage dancers at *Olympia*, at a salary of 21*s*. a week each.

On the 7th of November the Plaintiff ascertained as a fact that his said apprentices had signed agreements to perform for the Defendant *Barnum*, and he thereupon commenced the present action against the Defendant *Barnum*, his agent, the apprentices, and their mother, claiming an injunction to restrain the Defendants *Ada* and *Helen Maude Parnell* from performing, and the other Defendants from permitting or allowing them to perform without the permission of the Plaintiff.

The notice of motion as originally framed did not ask any immediate relief against the Defendants *Ada* and *Helen Maude Parnell*, but it was by consent amended at the hearing in this respect, thus raising the main question whether the negative clause in the apprenticeship deeds could be enforced by injunction against the infants.

There was evidence that the Plaintiff's establishment had a high reputation, and that it was a considerable advantage to the children, who were usually drawn from the poorer classes, to be trained there, as the Plaintiff's pupils are much sought after by theatrical managers: that the applications for admission to the Plaintiff's school were very numerous, and that as the pupils were mostly very poor, the only remuneration the Plaintiff obtained for his instruction was the pay he received from theatrical managers for the services of his pupils during the term of their apprenticeship.

Romer, Q.C., and *Kalisch*, for the Plaintiff:—

The mother is a party to and has executed this deed, as well as the infants; an action therefore will lie against the mother for what amounts to removing the infants from the service of the Plaintiff: *Gilbert* v. *Schwenck* (1); the deed too is manifestly beneficial for the infants and one into which they might properly enter and bind themselves; a contract of this nature can be enforced by injunction against the infants: *Fellows* v. *Wood* (2); *Simpson* on Infants (3).

[CHITTY, J.:—I see it stated in *Burn's* Justice, by *Chitty* (4), under the heading of Apprentices in General, "that no action can be brought against an infant apprentice on his covenant to serve" (*Gylbert* v. *Fletcher* (5)), "nor can he be sued in equity: 1 Eq. Ca. Ab. 6."]

No doubt an action cannot be brought against an infant on his covenant, for damages; neither can he be sued in equity for an account, as stated in 1 Equity Ca. Ab., under the head of "Account," still if he may lawfully bind himself, as seems to be admitted, there must be a way of enforcing the contract; where the contract contains a covenant not to serve anyone else during the apprenticeship, the remedy, we submit, is by injunction, as in *Fellows* v. *Wood*. A contract of service for teaching and wages is reasonable and binding upon these infants, it puts them in the way of maintaining themselves: *Leslie* v. *Fitzpatrick* (6); *Wood* v. *Fenwick* (7).

[CHITTY, J., referred to *Lylly's Case* (8) and *Simpson* on Infants (9).]

The conditions and provisions in these contracts are not unusual or inequitable; and even if any of them were, the Court could sever the good from the bad: *Pickering* v. *Ilfracombe Railway Company* (10).

The Defendant *Barnum* has been properly made a party:

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(1) 14 M. & W. 488.
(2) 59 L. T. (N.S.) 513.
(3) Page 91.
(4) 29th Ed. at p. 183.
(5) Cro. Car. 179.
(6) 3 Q. B. D. 229.
(7) 10 M. & W. 195.
(8) 7 Mod. 16.
(9) Page 92.
(10) Law Rep. 3 C. P. 235.

Lumley v. *Wagner* (1); the agent *Parravicini* has also been made a party, but no immediate relief is asked against him.

Bryne, Q.C., and *Lemon*, for the Defendant *Barnum*, the infants, and their mother:—

This is not a kind of contract of which specific performance could be obtained: *Flight* v. *Bolland* (2); neither can it be enforced by injunction: *Argles* v. *Heaseman* (3). *Gylbert* v. *Fletcher* (4) establishes the point that these covenants by an infant cannot be sued on at law, the covenant not to perform without consent cannot, as we submit, be enforced by injunction in equity. Neither can the parent be restrained, because parents cannot so far abdicate their rights as to bind themselves that their children shall do a certain service all through their minority. Then, suppose the parent died, there is nothing in the contract to compel the Plaintiff to do anything for these girls, and, looking at the deed as a whole, it is not beneficial for the infants, it is unreasonable on the face of it and therefore void: *Reg.* v. *Lord* (5), which case was approved though distinguished in *Leslie* v. *Fitzpatrick* (6). The decision in *Fellows* v. *Wood* (7), relied on by the Plaintiffs, is not in point, for in that case it would appear that the infant was of full age when the action was brought; besides, the principle of all the cases is that infants are incapable of binding themselves by contract: *per* Lord *Macnaghten* in *Cooper* v. *Cooper* (8). [They also referred to *Keane* v. *Boycott* (9).] No instance has been given by the Plaintiff of a successful action at law against an infant on his covenant to serve or of an injunction in equity. *Fellows* v. *Wood* and *Cornwall* v. *Hawkins* (10) are distinguishable. This application should be refused.

Wilkinson, for the Defendant *Parravicini*, took no part in the argument.

Romer, in reply.

(1) 5 De G. & Sm. 485.
(2) 4 Russ. 298.
(3) 1 Atk. 518.
(4) Cro. Car. 179.
(5) 12 Q. B. 757.
(6) 3 Q. B. D. 229.
(7) 59 L. T. (N.S.) 513.
(8) 13 App. Cas. 88, 107.
(9) 2 H. Bl. 511.
(10) 41 L. J. (Ch.) 435.

CHITTY, J. (after briefly stating the nature of the application, and that it was based upon the indentures of the 6th of December, 1886, one of which only, for the purposes of this case was referred to, continued):—

This deed is on the face of it—the one is just the same as the other—an instrument of apprenticeship. It is separable in form into two parts. The first part contains the contract on the part of the master with the apprentice, and the apprentice in terms with the master; and the second part of the instrument contains an agreement between the master and the mother, who was in 1886 the legal guardian of the children, she being the only parent living at the time.

Now this deed is an apprenticeship deed, and it was decided in the time of *Charles* I. that no action would lie on an apprenticeship deed against the apprentice himself. The statement in the case of *Gylbert* v. *Fletcher* (1) is this: "Covenant against an apprentice for departing from his service without license within the time of his apprenticeship. The defendant pleaded, that at the time of making the indenture he was within age; and thereupon it was demurred. It was argued at the bar, that this indenture should bind the infant, because it was for his advantage to be bound apprentice to be instructed in a trade. He is also compellable by the 5 Eliz. c. 4, to be bound out an apprentice. But all the Court resolved that, although an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years may have the benefit to use his trade, yet neither at the common law, nor by any words of the 5 Eliz. c. 4, shall the covenant or obligation of an infant for his apprenticeship bind him. But if he misbehave himself, the master may correct him in his service, or complain to a justice of peace to have him punished, according to the statute. But no remedy lieth against an infant upon such covenant: and therefore it was adjudged for the defendant." There were sitting in the King's Bench when that case was decided Sir *Nicholas Hyde*, Chief Justice, Sir *William Jones*, Sir *James Whitlock*, and Sir *George Croke*.

That case has never been questioned from that time to this, and it is cited in the various text-books as an authority. It is in *Simpson* on Infants, and it is in *Burn's* Justice (I refer to the 29th Ed. of 1845), and in both it is treated as an unquestionable authority. Other cases are cited in *Burn's* Justice as being to the same effect. So that ever since the time of *Charles* I. it has been established that you cannot sue an infant even upon the covenants which he purports to enter into during his infancy in an apprenticeship deed.

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(1) Cro. Car. 179.

Now, the covenant on which the Plaintiff is relying for the present purpose is a covenant on the part of the infants that they, during the apprenticeship, which is for a term of seven years, shall neither "contract professional engagements nor accept such unless with the full written permission of her said master;" that is, therefore, on the face of it, a covenant on the part of the apprentice during the apprenticeship, that is the only part of the indenture which purports to bind her, to which I will now refer, and it follows from what I have read, unless *Gylbert* v. *Fletcher* (1) can be overruled, that the infants, apart from any question whether the contract is for their benefit or not, cannot be sued. That being so, if they cannot be sued on the covenant, how can they be sued for an injunction? Because the right to an injunction depends upon the legal right to sue, and if there is no legal right to sue, which appears to be the result of the authority which I have cited, there can be no right to an injunction. Injunction in cases of this kind to restrain a breach of a negative clause in a contract for service is granted because, first, it is a negative clause; and, secondly, because damages are not an adequate remedy, and it is considered right in cases of that kind to interfere directly by preventing a breach, which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there can be no right to an injunction.

That is the case, therefore, against the infants. A great many points have been raised, points which turn upon a critical examination of this instrument, whether the instrument is really for the benefit of the infants or not. I propose not to say anything about those points on the present occasion, I think it is safer on this part of the case to rest it on the ground on which

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(1) Cro. Car. 179.

I have already put it, namely, that up to this time I cannot find that any such action has been allowed to proceed against an infant. It may be when the various statutes, the *Statute of Elizabeth*, and the subsequent statutes with regard to apprenticeship, have been all examined, that there may be some explanation given of that authority; but at present, as that authority has never been impeached, and has stood the test of centuries, it would be wrong for me on an application for an interim injunction even to throw any doubt upon it; and certainly, after listening to the elaborate arguments I have heard on both sides, I cannot see any present escape from that particular authority.

But the case with regard to the infants does not rest there for the purposes of this injunction, for, without criticising the terms of this instrument, the present state of things appears to be this. The Plaintiff is not under any obligation to provide employment, or wages, or remuneration for the infants, and it may be—for I see nothing whatever to affect the good faith of the Plaintiff in this case—that between this and the hearing of this action he will provide some employment for these young women; but at the present moment he has not done so, and they have come to that age when their services (very likely from the training they have received from him) are of value, and at the present moment they have this engagement with Mr. *Barnum*, under which they will receive their 21*s.* a-week; therefore, exercising a discretion, as I am entitled to do with regard to an interlocutory injunction, I think it would not be fitting to grant an injunction which might leave these two young women until the trial without any remuneration or without any employment whatever; I think on the balance of convenience and inconvenience it would be wrong to act adversely to the infants at present. Therefore, leaving the various questions as to the reasonableness or the unreasonableness of the terms of some parts of this apprenticeship indenture open, I think that I ought not to grant, and I decline to grant, any injunction against these young women.

That being so, for similar reasons, I ought not to interfere with Mr. *Barnum*. I ought not, for the reasons that I have last given on the question of convenience, to interfere as against Mr. *Barnum*, because if I restrain Mr. *Barnum* from employing the young

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women they will be just in the same position as if I restrained them from going on with their performances at *Olympia.*

Then it would be idle, as I refuse the injunction against the infants, to restrain the mother.

I ought to say one word about the case of *Fellows* v. *Wood* (1), which was cited as an authority for an injunction against an infant, where the infant had entered into a contract. On carefully reading the report I am persuaded that the defendant in that case was not an infant at the time when the injunction was granted, and it was not a contract of apprenticeship; it was a mere contract of service. There is ground also for thinking that after the infancy had terminated the defendant did continue to serve, and then, although he might have vacated the employment at a fortnight's notice, what he did was to go away, and then, in breach of an article to be found in the contract of employment, he served the plaintiff's customers for his own benefit. That is what he was doing, and that is what he was restrained from doing. Having given that case considerable attention, I think, as a fact, that the injunction was not granted against an infant but it was granted against a man of age, who, to a certain extent, appears to have acted upon the contract — whether he adopted it or ratified it afterwards, I cannot say—after the infancy had terminated. But that was a contract of service, whereas what I have decided on the present motion was upon the footing of the contract being in an apprenticeship deed. In the case of *Fellows* v. *Wood* there could have been no ground for avoiding the contract not to serve the plaintiff's customers as being an unlawful restraint of trade, whereas apart from the present contract being in an apprenticeship deed, there would be some ground for saying that this general stipulation not to contract any professional engagement whatever without the license of the Plaintiff, was in restraint of trade, seeing that there is not a continuous employment on the part of the Plaintiff. I have only added this, that there may be no mistake as to the grounds on which I have proceeded.

Solicitors: *Brandon & Nicholson; Campbell, Reeves & Hooper; H. Levy.*

W. C. D.

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(1) 59 L. T. (N.S.) 513.

PRATT *v.* INMAN.

[1889 P. 2186.]

CHITTY, J.
1889
Dec. 16.

Sequestration—Contempt—Payment into Court—Performance of a Duty—Death of Contemnor—Revivor—Order for Sale—Administration—Insolvent Estate—Rules of Supreme Court, 1883, *Order* XLIII., *r.* 6—*Judicature Act,* 1875, *s.* 10—*Bankruptcy Act,* 1883, *s.* 45.

A trustee having failed to comply with an order directing him to pay money into Court, a writ of sequestration was issued against his estate and effects, and subsequently the sequestrators were authorized to sell certain chattels in their possession belonging to the trustee. Before any sale was effected the trustee died, and a creditor's action was brought, in which the usual judgment was made and a receiver appointed. The trustee's estate was insolvent, and the receiver and the administrator of the deceased trustee commenced an action against the sequestrators to restrain them from selling the chattels and moved for an injunction:—

Held, on the authority of *Hyde* v. *Greenhill* (1) that sequestration to compel the performance of a duty is not determined by the death of the person against whose estate and effects sequestration has been issued; and proceedings may therefore be continued against his legal personal representative.

Held, also, that sect. 45 of the *Bankruptcy Act,* 1883, restricting the rights of creditors under execution or attachment, is not made applicable to the administration of insolvent estates in the Chancery Division by the *Judicature Act,* 1875, sect. 10.

Motion accordingly refused.

MOTION.

This was an application to restrain sequestrators from proceeding with a sale of chattels, which raised the question whether proceedings under a writ of sequestration to enforce the performance of a duty, such as payment into Court, were or were not determined by the death of the party against whose estate the sequestration had been issued.

By an order of the 6th of May, 1889, made by Mr. Justice *Stirling,* in an action of *Re Dennis Shephard, Shephard* v. *Shephard* (1889 S. 1144), one *Mark Shephard,* the sole Defendant, as the surviving trustee of a will therein referred to, was directed to pay into Court on or before the 20th of May, 1889, or within seven days after service of the said order, a sum of £2000 for which he had become liable by reason of a breach of trust. This order was not complied with. On the 21st of June, 1889, a writ of sequestration was issued to the Defendants in the present action, under which they were empowered to enter upon all the real estate of the said *Mark Shephard,* and to collect and sequester not only all the rents and profits of his said real estate, but also all his chattels and personal estate, and to obtain and keep the same under sequestration until the said *Mark Shephard* should pay into Court the said sum of £2000 and clear his contempt. The Defendants accordingly took possession of the furniture and effects in *Mark Shephard's* residence.

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(1) 1 Dick. 106.

By an order of the 27th of June, 1889, the said Defendants, the sequestrators, were authorized to sell the furniture, chattels, effects and personal estate in or about the residence of the said *Mark Shephard,* but the sale was, by arrangement between *Mark Shephard* and the sequestrators, delayed, on his paying something on account of his liability, and promising shortly to pay the whole.

On the 17th of August, 1889, *Mark Shephard* died intestate, and immediately afterwards an action of *Re Mark Shephard, Atkins* v. *Shephard* (1889 S. No. 3177) was commenced by a creditor for the administration of the real and personal estate of the said *Mark Shephard,* in which *H. J. Pratt,* one of the Plaintiffs in the present action, was, on the 21st of August, appointed interim receiver of the personal estate and of the rents and profits of the real estate; the Plaintiff *H. J. Pratt* thereupon put a man in possession of the said *Mark Shephard's* residence and of the furniture and effects therein on the 22nd of August, who was alleged to have remained in possession up to the date of the present application.

On the 17th of September, 1889, letters of administration of the estate of the said *Mark Shephard* were granted to the other Plaintiff in the present action, *Stuart Shephard,* who was also *Mark Shephard's* heir-at-law.

On the 21st of September, 1889, an order was made in *Re Dennis Shephard, Shephard* v. *Shephard* that the further proceedings in that action should be carried on against the Plaintiff, *Stuart Shephard.*

On the 25th of September, 1889, judgment in the said action of *Re M. Shephard, Atkins* v. *Shephard* was made directing the usual accounts and inquiries and continuing the Plaintiff *Pratt* as receiver.

On the 9th of October, 1889, the Plaintiffs commenced the present action against the sequestrators to restrain them from selling the furniture, chattels and effects in *Mark Shephard's* said residence, in which action an interim order was obtained till the 1st of November.

On the 30th of October, 1889, the Plaintiffs delivered a statement of claim in which they alleged that *Mark Shephard's* estate was insolvent, and that the value of his estate would be seriously depreciated if the said furniture and effects, which were of great value, were sold separately from his said residence. The sequestrators having expressed their intention of forthwith selling the furniture and effects, the Plaintiffs now moved for an injunction until the trial or further order to restrain them from proceeding with their sale. No formal objection was taken at the hearing that the Plaintiffs in the first action were not parties to the present application.

Byrne, Q.C., and *Dibdin*, for the Plaintiffs:—

An order for payment into Court does not constitute the person obtaining it a judgment creditor: *Ward* v. *Shakeshaft* (1), neither does sequestration, being a mere process of contempt, create a debt, or give any charge on the contemnor's assets, in priority to the other general creditors: *Johnson* v. *Burgess* (2). If, therefore the Defendants are not judgment creditors, and have no priority, they are in no better position from the mere fact that they have been authorized to sell. Then we say that sequestration, being a process of contempt, is at an end on the death of the contemnor. Further, if the Defendants have a lien or claim, so that they are creditors in a wider sense, *Mark Shephard's* estate is insolvent, and is now being administered in this Court, therefore, under the *Judicature Act*, 1875, sect. 10, the Bankruptcy Rules which may be in force for the time being apply, and we can claim the benefit of the provisions of the *Bankruptcy Act*, 1883, sect. 45, sub-sects. 1, 2, and the sequestration not having been completed by sale is avoided. The *Judicature Act*, 1875, sect. 10, is not limited, as stated in *In re Withernsea Brickworks* (1), to the existing Bankruptcy Rules, but was intended to apply to any future additions or alterations which in legislation as to bankruptcy might be thought fit: *Mersey Steel and Iron Company* v. *Naylor, Benzon & Co.* (2) The Defendants are therefore not entitled to sell these chattels and should be restrained accordingly.

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(1) 1 Dr. & Sm. 269.

(2) Law Rep. 15 Eq. 398.

Romer, Q.C., and *Clydesdale*, for the Defendants:—

Proceedings under a writ of sequestration are *in rem*, and not *in personam*: *Tatham* v. *Parker* (3). Sequestration having been issued to compel the performance of a duty does not come to an end by the death of the person against whose estate it has been issued, and proceedings may, if necessary, be revived: *Hyde* v. *Greenhill* (4); *Rowley* v. *Ridley* (5); the writ binds personal property in possession—and we have been in possession—from the time it is issued: *Burdett* v. *Rockley* (6). Proceedings have been continued in the action of *Re Dennis Shephard, Shephard* v. *Shephard* against the administrator of *Mark Shephard's* estate. [They also referred to *Francklyn* v. *Colhoun* (7) and cases collected in notes to *Francklyn* v. *Colhoun* (pp. 294, 298).] Then, if the sequestrators are not creditors, as we admit they are not, and as Plaintiffs argue they are not, there is an end of their argument on the *Judicature Act*, 1875, sect. 10.

No bankruptcy proceedings are pending against *Mark Shephard's* estate. The special provisions of the *Bankruptcy Act*, 1883, sect. 45, are not incorporated by *Judicature Act*, 1875, sect. 10; the sole object of that section was to introduce the bankruptcy rule that a secured creditor could only prove for the balance of his debt: *In re Withernsea Brickworks; Buckley* on Companies Acts (8). A *cestui que trust* is not a creditor; and the provisions of the *Bankruptcy Act*, 1883, sect. 45, apply only as between debtor and creditor. Before they do apply it is essential that this relationship be established: *Ex parte Taylor* (1). Then there is the further objection to this application which has not been insisted upon, as there is a good defence on the law, that the Plaintiffs in the first action are not parties to this application. The application is wholly wrong and should be dismissed.

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(1) 16 Ch. D. 337.

(2) 9 App. Cas. 434, 437.

(3) 1 Sm. & Giff. 506, 514.

(4) 1 Dick. 106.

(5) 2 Dick. 622, 626.

(6) 1 Vern. 58.

(7) 3 Sw. 276, and cases in note (*a*).

(8) 5th Ed. p. 344.

Byrne, in reply:—

None of the old authorities cited against us shew that sequestration goes on as before when revivor has been obtained; they only shew that sequestration is not necessarily suspended by death. The word "creditor" must be construed in the larger sense, so as to include persons having an equitable demand against an estate; the Defendants have some kind of a lien or charge whether they call themselves creditors or not.

[He also referred to *Walker* v. *Bell* (2).]

CHITTY, J. (after stating the nature of the present application, and briefly referring to the three actions now pending, in relation to *Mark Shephard*, or his estate, and the facts as above, continued):—Now, in that state of things, what is the law? Sequestration unquestionably was and is a process of contempt. Sequestration was issued to compel a man formerly to put in an answer and the like, and sequestration also went to compel (in the words of Lord *Hardwicke*), a defendant to perform a duty, such as the payment of money, and such of course as the payment of money into Court.

Now it was decided by Lord *Hardwicke* in *Hyde* v. *Greenhill* (3), that the death of the defendant did not discharge the sequestration where sequestration had been issued for the purpose of compelling him to perform a duty. Of course if the sequestration was only to issue for the purpose of compelling him to put in an answer, and he was dead, the sequestration would have been discharged. Lord *Hardwicke* said in the case of *Hyde* v. *Greenhill*: "A sequestration covered the personal estate, and the Court would direct a sale for a duty." In that case the original Defendant had died, and the suit had been revived against those who represented his real and personal estate; and

(1) 18 Q. B. D. 295.

(2) 2 Madd. 21.

(3) 1 Dick. 106.

his Lordship declined to discharge sequestration as to the personal estate, because the sequestration was for a duty, and the suit had been duly revived, so that if this motion had been made, which it is not, in the first action of *Re D. Shephard, Shephard* v. *Shephard*, the Court, acting on that authority, which is not the sole authority on the point, would not have discharged the sequestration, and would, as Lord *Hardwicke* did in that case after the death, in the presence of the persons who represented the personal estate, have ordered the sale. The result, therefore, is that any motion made in that action against the Defendants, the sequestrators, must have failed.

Now on what ground is the motion supported? First, it was argued by Mr. *Byrne*, that inasmuch as the order in the first action was an order for the payment of money into Court, the Plaintiffs are not creditors. That is immediately conceded by the Defendants' counsel on the motion, and rightly. An order for the payment of money into Court does not make a man a creditor. A man who has obtained an order for the payment of money into Court cannot take bankruptcy proceedings upon it. That has been decided.

Then Mr. *Byrne's* argument is, that by virtue of the 10th section of the *Judicature Act* of 1875, the 45th section of the *Bankruptcy Act* of 1883 is imported into the law of administration, because the estate of *Mark Shephard* is alleged to be insolvent. The Plaintiffs in the first action have not come in to prove as creditors, and they are not creditors of the deceased by virtue of the order, nor are they creditors in the ordinary sense of the term. They have a demand against this estate of an equitable character by reason of the breach of trust. The 10th section of the *Judicature Act*, 1875, has not imported into the administration of an insolvent estate generally any of the provisions of the *Bankruptcy Act* which were then in force, or are in force at the present time. It has only imported them where the administration is by the Court. The bankruptcy provisions are imported into the administration of a dead man's estate by the Act of 1883 by a set of express provisions which apply to the case of the administration of the estate being in bankruptcy and the estate being of course insolvent.

Now the 45th section of the Act of 1883 runs thus: "Where a creditor has issued execution," that is the commencement of the section. The counsel for the Respondent on the motion argue that the first proposition on the part of the Plaintiffs' counsel has put him out of Court, because the Plaintiffs in the breach of trust action are not creditors, and that observation appears to me to be well founded.

Then supposing the word "creditor" ought to be taken in the larger sense to mean persons who have an equitable demand against the estate of a dead man, are the provisions of the 45th section imported into administration by the Court by virtue of the 10th section of the *Judicature Act* of 1875? I am of opinion that that is not so, and I am of opinion further that the provisions of the 45th section do not apply to the present circumstances. The section runs, "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor." There is no question here about the trustee in bankruptcy of the debtor, "unless he has completed the execution or attachment before"—what?—"before the date of the receiving order"—there is no receiving order here—"and before notice of the presentation of any bankruptcy petition"—there is no bankruptcy petition here filed—"by or against the debtor, or of the commission of any available act of bankruptcy by the debtor," of course there was none in this case, and this is the argument for the Plaintiffs. They must say that the 45th section is imported in order to accomplish their object, which is the bringing in of the second part or sub-section of the 45th section, which runs thus: "For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." The important words there are: "For the purposes of this Act, an execution against goods is completed by seizure and sale," consequently they refer to the seizure of the goods not having been sold under the order giving the sequestrators liberty to sell, and say that the execution falls within this second sub-section.

Now I adopt for this purpose the principle which Lord Justice *James* acted upon in *In re Withernsea Brickworks* (1); whether any expression there ought to be modified or not by reason of what Lord *Selborne* said in the more recent case of the *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Co.* (2), I need not stay to consider. I think the principle on which Lord Justice *James* acted in declining, in the *Withernsea Brickworks*, to import into an administration of a dead man's insolvent estate, in the Chancery Division, the provisions of the Act which deprive execution creditors of the fruits of the execution where the sheriff has notice of bankruptcy within fourteen days after sale, applies entirely to the case now before me. The result therefore is that the 45th section is not in my opinion imported, and that sub-sect. 2 of it is not imported (I state that as a general proposition), and it certainly is not imported, in the circumstances, in this case. Therefore I refuse the motion.

[This application was subsequently by consent treated as the hearing of the action, which was set down, and dismissed with costs.]

Solicitors: *R. J. Witty; Coode, Kingdon, & Cotton*, agents for *E. F. Chamier, Stratton.*

(1) 16 Ch. D. 337.

(2) 9 App. Cas. 437.

W. C. D.

FRANCIS *v.* HARRISON.

NORTH, J.
1889
Nov. 23.

[1889 F. 434.]

Parties—Trustee representing Cestuis que trust—Foreclosure Action—Rules of the Supreme Court, 1883, *Order* XVI., *r.* 8.

A mortgagee who is a trustee of his mortgage for the beneficial owners of the mortgage money, and who has become bankrupt, cannot, as Defendant to a foreclosure action by a prior mortgagee, properly represent his *cestuis que trust*, but, notwithstanding rule 8 of Order XVI., the *cestuis que trust* are necessary parties to the action.

Mills v. *Jennings* (1) distinguished.

MOTION by the Plaintiffs for judgment in default of pleading by the Defendants. The action was a foreclosure action. The Plaintiffs were first mortgagees; the Defendants were, *Harrison*, the mortgagor; *Sankey*, a second mortgagee; and *Cooper*, the trustee in his bankruptcy. *Sankey* was adjudicated a bankrupt in February, 1889. He was a trustee of the money secured by his mortgage for various persons, in whose favour he had executed declarations of trust. *Sankey* had not entered any appearance to the writ; the other Defendants had appeared, but had not delivered any defence.

Napier Higgins, Q.C., and *B. Fossett Lock*, for the motion:—

By virtue of rule 8 of Order XVI., *Sankey*, as trustee, sufficiently represents his *cestuis qui trust*, and they are not necessary parties to the action: *Jennings* v. *Jordan* (2).

[NORTH, J., referred to *Mills* v. *Jennings* (1) (a prior stage of *Jennings* v. *Jordan*).]

None of the Defendants appeared.

NORTH, J.:—

In my opinion the Defendant *Sankey* does not sufficiently represent his *cestuis que trust*. *Mills* v. *Jennings* was a redemption action. A foreclosure action differs entirely from a

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(1) 13 Ch. D. 639.

(2) 6 App. Cas. 698, 710.

NORTH, J.
1889
FRANCIS
v.
HARRISON.

redemption action. In the former the defendant has to provide money to redeem the mortgage; in the latter the defendant has to receive money paid for redemption. It cannot be supposed that an insolvent trustee will be able to find money to redeem a mortgage. The observations made by Lord Justice *Cotton* in *Mills* v. *Jennings* (1) appear to me to be precisely in point. The Lord Justice said "Under Order XVI., rule 7, of the Rules of Court, 1875, trustees may, both as plaintiffs and defendants, sufficiently represent the trust estate without any of the parties beneficially interested being before the Court, with power nevertheless for the Court or a Judge to direct any of such last-mentioned persons to be made parties. But this rule is in substance a repetition of rule 9, sect. 42, of the *Chancery Act*, 1852; and it was argued that, in suits relating to mortgages, it had been held, as in *Goldsmid* v. *Stonehewer* (2), that trustees did not sufficiently represent their adult *cestuis que trust*, unless it was probable that the trustee, from being executor or otherwise, had funds in hand sufficient to enable him to redeem. But that case was a suit for foreclosure, in which the trustee was a defendant whom the plaintiff sought to foreclose; and there is a reason in such a case for not giving the plaintiff the relief he seeks unless he brings before the Court all those interested in the equity of redemption who may probably have the means of redeeming the mortgage. Here the Plaintiff-trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the Defendant *Jennings*, so as to prevent any further proceedings for redemption in respect of the property vested in the Plaintiff as trustee." I should have had great difficulty in holding that even a solvent trustee who is a mortgagee sufficiently represents his *cestuis que trust* as defendant to a foreclosure action. But here the trustee is a bankrupt, and under these circumstances I think the *cestuis que trust* are not only proper but necessary parties to the action, and I cannot give judgment for foreclosure in their absence. I will give liberty to amend, but I can make no other order.

Solicitor for Plaintiffs: *H. A. Dowse.*

(1) 13 Ch. D. 649.

(2) 9 Hare, App. xxxviii.

W. L. C.

EMERIS *v.* WOODWARD.

NORTH, J.
1889
Nov. 23.

[1886 E. 803.]

Compromise of Action—Application to set aside—Summons—Jurisdiction.

An application to set aside an agreement for the compromise of an action cannot be made by a summons in the action; a fresh action must be brought for the purpose.

Gilbert v. *Endean* (1) followed.

An agreement having been entered into for the compromise of an action, the Plaintiff took out a summons in the action to set it aside. The objection was taken in Chambers that the compromise could not be set aside on a summons. After this the Plaintiff filed his affidavits; the Defendant then filed his affidavits and cross-examined the Plaintiff's witnesses:—

Held, that the Defendant had not by his conduct waived the objection. The summons was accordingly dismissed.

THIS action was brought against an executor claiming an order that he should execute transfers to the Plaintiff of three mortgages in pursuance of an alleged agreement. On the 2nd of August, 1887, an agreement was entered into between the Plaintiff and the Defendant for the compromise of the action on certain terms therein contained. This agreement was made subject to its being approved by the Judge in another action which had been brought to administer the testator's estate, and that approval was afterwards obtained.

On the 4th of February, 1889, the Plaintiff took out a summons entitled in both the actions, asking that so much of the agreement of the 2nd of August, 1887, as provided that the Defendant *Woodward* should forthwith make and execute (*inter alia*) an assignment to the Plaintiff of a mortgage dated the 30th of December, 1878, might be varied as in the summons mentioned.

On the 16th of July, 1889, the Plaintiff took out a second summons, by which he asked that he might be at liberty to amend the first summons by adding thereto the words "or that the said agreement may be set aside *in toto*, or that the Plaintiff may be at liberty to continue the action of *Emeris* v. *Woodward*, or to take such proceedings against the Defendant as he may be advised."

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(1) 9 Ch. D. 259.

Cozens-Hardy, Q.C., and *B. Eyre*, for the Plaintiff.

Napier Higgins, Q.C., and *T. L. Wilkinson*, for the Defendant:—

There is a preliminary objection, viz., that a compromise of an action cannot be set aside upon a summons. If the Plaintiff's claim is well founded, he ought to raise it by means of a fresh action: *Gilbert* v. *Endean* (1); *Pryer* v. *Gribble* (2). In *Scully* v. *Lord Dundonald* (3) the motion was to enforce a compromise, not to set it aside.

Cozens-Hardy, Q.C., and *B. Eyre*, for the Plaintiff:—

If this objection was not taken in Chambers it cannot be taken now: *Gilbert* v. *Endean*. But, if it was taken in Chambers, the Defendant has by his conduct waived it. He has filed affidavits in answer to those of the Plaintiff, and has cross-examined the Plaintiff's witnesses.

NORTH, J.:—

In my opinion the objection must prevail. I think that the Plaintiff's proper course is to bring a new action to set aside the compromise, and that he cannot by means of a summons set aside the agreement and re-open the controversy. It is said that the Defendant has by his conduct waived the objection. It is clear, I think, that such an objection can be waived by conduct. But the Chief Clerk's notes shew that the objection was raised in Chambers at an early stage, and that it was clearly pointed out to the Plaintiff that he ought to bring a fresh action. In my opinion the Defendant has done nothing to waive the objection. Knowing of the objection the Plaintiff chose to put in his evidence, and after that it was incumbent on the Defendant for his own protection to put in and complete his evidence in answer. I must dismiss both the summonses with costs.

Solicitors: *G. L. P. Eyre & Co.; Long & Gardiner.*

(1) 9 Ch. D. 259, 266, 268.
(2) Law Rep. 10 Ch. 534.
(3) 8 Ch. D. 658.

W. L. C.

EDEVAIN *v.* COHEN.

C. A.
1889
Dec. 4, 6, 7.

[1886 E. 511.]

Practice—Amendment at Trial—Pleading Judgment in former Action—Rules of Supreme Court, 1883, *Order* XIX., *r*. 15; *Order* XXVIII., *r*. 1.

An action was brought against *A.* and *B.* for wrongful removal of furniture. At the trial it appeared from the evidence of the Plaintiffs that they had recovered judgment in an action against other persons who had joined in the removal. After the evidence for the Plaintiffs and for *A.* had been taken, *B.* asked for leave to amend by pleading the judgment, and *A.* thereupon made the same application. *North*, J., refused the application, and on the merits gave judgment for the Plaintiffs. *A.* appealed:—

Held, by the Court of Appeal, that on the pleadings as they stood *A.* could not avail himself of the judgment in the former action, for that it ought to have been pleaded:

Held, also, that leave to amend had been rightly refused at the trial.

THIS was an appeal from a decision of Mr. Justice *North*, which, so far as it related to an application for amendment at the trial, is reported (1).

The action was brought for delivery to the Plaintiffs of articles of furniture belonging to them, alleged to have been wrongfully removed by certain persons of whom the Defendants *Cohen* and *Cook* were two, and for damages.

At the trial it appeared from the Plaintiffs' evidence that the Plaintiffs had recovered judgment in another action of *Edevain* v. *Watmore* against persons other than the Defendants in respect of the same transaction. After the evidence for the Plaintiffs and *Cohen* had been taken counsel for *Cook* asked for leave to amend by pleading the judgment in the other action, and counsel for *Cohen* then made a like application.

Mr. Justice *North* refused to allow the proposed amendment, and upon the merits of the case gave judgment in favour of the Plaintiffs.

From this judgment the Defendant *Cohen* appealed.

Oswald, for the Appellant:—

The judgment obtained in the previous action is a bar to the present action. The law is settled that a judgment against one or more of several joint tortfeasors is a bar to an action against the others for the same cause: *Brinsmead* v. *Harrison* (1), following *King* v. *Hoare* (2); and in *Kendall* v. *Hamilton* (3) it was held that the *Judicature Act* did not alter the law. The objection is open to the Appellant, although not taken on the pleadings. Order XIX., rule 15, requires that a party should raise by his pleadings "all matters which shew the action . . . . not to be maintainable . . . . and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, *Statute of Limitations*, release, payment, performance, facts shewing illegality either by statute or common law, or *Statute of Frauds*." There can be no surprise in this case, for the existence of the judgment in the previous action was matter well known to the Plaintiffs. The existence of such judgment is not a new issue of fact but matter of law, which, moreover, appeared from the Plaintiffs' own evidence, and that circumstance is sufficient to justify the Appellant in taking the objection so disclosed: *Coote* v. *Judd* (4).

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(1) 41 Ch. D. 563.

But assuming that the previous judgment ought to have been pleaded, I submit that leave to amend ought to have been given according to the principle laid down in *Tildesley* v. *Harper* (5), acted upon in *Laird* v. *Briggs* (6), and stated by Lord Justice *Bowen* in *Cropper* v. *Smith* (7). In the last mentioned case leave to amend was refused on the ground that the defendant had so deliberately adopted a particular course that he could not be allowed at the last moment to depart from it. *Cohen* did not know of the judgment. As the Lord Justice *Bowen* said in *Cropper* v. *Smith*, the object of the Court is "to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights." The principle of the recent cases is that an amendment will be allowed if it is wanted to enable the questions to be fairly tried, unless it is impossible to put the opposite party in as good a position as he would have been in if the person seeking leave to amend had pleaded correctly at first, on which ground leave to amend was refused in *Steward* v. *North Metropolitan Tramways Company* (1). Here the opposite party will suffer nothing which will not be made good by costs. Mr. Justice *North* thought that the refusal of leave to amend in *Collette* v. *Goode* (2) was inconsistent with the principle of the later cases, but distinguished the present case on the ground that *Cohen* knew of the existence of the matter as to which he asked to amend. But though he may have known of the previous action, there was no evidence that he knew of the judgment; and that is the only matter as to which knowledge by him could be material, for it is the existence of the judgment, not that of the action, which constitutes the bar.

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(1) Law Rep. 6 C. P. 584; 7 C. P. 547.

(2) 13 M. & W. 494.

(3) 4 App. Cas. 504.

(4) 23 Ch. D. 727.

(5) 10 Ch. D. 393.

(6) 19 Ch. D. 22.

(7) 26 Ch. D. 700, 710.

Cozens-Hardy, Q.C., and *George Henderson*, for the Respondents, were not called upon.

COTTON, L.J. :—

In dealing with this appeal I will first of all consider what case the Appellant is entitled to raise having regard to the pleadings. It has been contended that a former judgment obtained in another action by these Plaintiffs against other tortfeasors engaged in this transaction was a bar to this action, and that the Appellant was entitled to raise that point without any amendment of the pleadings. That is the first question in this case. But when Order XIX., r. 15, is looked at it is impossible to come to that conclusion. [His Lordship read the rule, and continued :—] The point sought to be raised, in my opinion, comes within the terms of that rule. That is material, because if the Appellant were allowed to raise this point, the Plaintiffs ought to be at liberty to make amendments, shewing that notwithstanding the judgment in the previous action they were entitled to maintain the present action.

The contention of the Appellant, however, is that he is only raising a point of law, not an issue of fact. But that is not so; the amendment would raise facts to enable a point of law to be relied upon; and those facts ought, according to the rule, to have been pleaded by the present Appellant in answer to this action. Then it is said that the Appellant ought to have liberty to amend his pleadings. An application to that effect was made to Mr. Justice *North*, and the learned Judge, after he had heard all the evidence, refused leave to amend. That was done by him in the exercise of his discretion, and that fact alone, to my mind, is a strong reason to induce us now to refuse leave to amend. Another strong reason is this. I do not think that this amendment is necessary to bring out the real question between the parties. I think this amendment is proposed merely to enable the Appellant to avail himself of what I may call a technical rule of law supported by the cases which have been referred to, and not in order to determine the real issue which ought to be determined in this action. Further, this objection was not taken and insisted upon at once by *Cohen*, the present Appellant in the Court below; it was first mentioned, and the objection was first taken by counsel, who then appeared for another defendant, and it was only raised and insisted on on behalf of *Cohen* after substantially all the evidence had been taken and he had taken his chance of the evidence turning out in his favour. I therefore quite agree with what was done by the learned Judge when he refused this Defendant liberty to amend, and it was well within his power to come to that conclusion. [His Lordship then dealt with the case on the merits, and in the result held that the appeal must be dismissed.]

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(1) 16 Q. B. D. 556.

(2) 7 Ch. D. 842.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Nordon; Morris & Rickards.*

C. C. M. D.

TOMLIN *v.* LUCE.

C. A.
1889
Dec. 7, 9, 10.

[1887 T. 1382.]

Mortgage—Sale by First Mortgagee—Mistake by Agent—Incorrect Particulars —Compensation to Purchaser—Liability to Second Mortgagee—Measure of Liability—Form of Order.

On a sale by first mortgagees their auctioneer inserted in the particulars a statement as to the condition of the roads on the property, which turned out to be incorrect; and the purchaser declined to complete without compensation. Compensation was allowed, and the sale was completed:—

Held, by *Kekewich*, J., that the first mortgagees were liable to the second mortgagees in respect of the mistake, and in taking the account between them must be charged with the sum allowed as compensation.

On appeal,

Held, by the Court (in varying the judgment of *Kekewich*, J.), that the first mortgagees were liable to the second mortgagees for any loss occasioned by the mistake, but that the difference between the price realised and that which the property would have realised if there had been no misdescription, was, and the sum allowed as compensation, was not, the true measure of such liability; and the second mortgagees desiring it, and the first mortgagees not objecting to it, the Court directed an inquiry whether the property would have sold for any and what sum in excess of the amount actually realised, in case it had been sold without the misstatement; with consequential directions; the costs of such inquiry to follow the result.

APPEAL from a decision of Mr. Justice *Kekewich* (1).

The Defendants to the action were first mortgagees of certain property at *West Kensington* (forming part of a building estate), which, in exercise of their powers, they had put up for sale by auction in lots, and they had sold three of such lots to a purchaser for £20,800. Their auctioneer had by mistake inserted in the particulars under which the sale was made a statement that "all the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect main drainage."

The purchaser subsequently found that this statement was incorrect, and claimed compensation. After some dispute the Defendants allowed him £895 as compensation, and the sale was carried into effect, the Defendants receiving £19,905 instead of the original purchase-money of £20,800.

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(1) 41 Ch. D. 573.

The Plaintiff *Tomlin* was the second mortgagee of the property, and he brought this action against the Defendants claiming an account of all moneys received by them, or which but for their wilful neglect and default they might have received from or on account of the sale, and payment of the amount which upon taking the account should be found due.

The principal question was as to the £895, and the Plaintiffs contended that, as a mortgagee selling is a trustee of the surplus, he is bound to do his best, and that the Defendants were answerable for the mistake, and ought not in taking the account to be allowed the £895 which they had given up. The Defendants denied their liability, alleged that they had employed competent auctioneers, and that the mistake was not theirs, and contended that in allowing the compensation they had taken the wisest course.

Mr. Justice *Kekewich* held that the Defendants had been well advised in compromising the purchaser's claim and allowing the £895 to be deducted from the purchase-money; and held further that a serious misstatement had been made by their agent, for which, as between mortgagees and mortgagor (or a person in that position), the Defendants were liable, and that the value of that misstatement must be taken to be the £895 allowed; and accordingly that in taking the accounts between the first and second mortgagees the Defendants must be charged with that £895 as part of the purchase-money which they ought to have received.

From this decision the Defendants appealed.

Warmington, Q.C., and *G. Harris Lea*, for the Appellants:—

As the learned Judge has in his judgment held that we were clearly wise to make the deduction, and has also found the "value of the misstatement" to be £895, we maintain that instead of charging it to the mortgagees he ought to have allowed it to them in their account. If mortgagees thinking they had three pieces of land in their mortgage put them up for sale, and it turned out there were only two, it cannot be right to make them account to the mortgagor for what was offered for the three, for that would be giving to the mortgagor the price or value of land which never had been his. [They were stopped by the Court.]

Neville, Q.C., and *Charles Browne*, for the Respondents, the second mortgagees:—

We do not say that the Defendants were wrong in compromising with the purchaser. What we complain of is the error which got them into the difficulty. The contract was either rescindable or not. If not, £895 too little has been accepted by the Defendants. But the fact is that, by a mistake for which the Defendants are answerable, a contract which was otherwise not open to rescission became rescindable, and in the result there has been a diminution in the sale moneys for which the Defendants are liable to the second mortgagees, who are the persons entitled (as against them) to the equity of redemption.

The question is what is the amount of that diminution, and how is it to be ascertained. If the other side say that the loss was not £895, why did they pay the purchaser £895 to complete? The learned Judge in the Court below considered that "the value of the misstatement must be taken to be this £895," and that that sum was the measure of the damage for which the Defendants were liable; and so the inquiry was not taken. But we do not insist that the £895 must be the measure of their liability, or upon maintaining the judgment as it stands in that respect. We are and always have been willing to have an inquiry to bring out the difference between the price which the property actually fetched, and that which it would have fetched if the mistake had not been made, for that is no doubt the true measure of the Defendants' liability to us.

G. Harris Lea, in reply:—

I do not oppose an inquiry at the risk of the Respondents if they desire it.

[During the argument *Marriott* v. *Anchor Reversionary Company* (1), *In re Terry & White's Contract* (2), and *In re Chifferiel* (3), were referred to.]

COTTON, L.J.:—The order is one which will require some care and we will give judgment to-morrow morning.

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(1) 2 Giff. 457; 3 D. F. & J. 177.
(2) 32 Ch. D. 14.
(3) 40 Ch. D. 45.

1889. Dec. 10. COTTON, L.J. (after stating the facts of the case continued):—

The Plaintiffs, who as second mortgagees may be treated as owners of the equity of redemption, contend that in the accounts between them and the Defendants this sum of £895 ought to be struck out and disallowed, upon the ground, as it is put by their pleadings and in argument, that the first mortgagees were answerable for what they received, or what, but for their wilful default, they might have received. The judge has found that the £895 was a sum reasonably and properly allowed by the first mortgagees to the purchaser in order to avoid any contest with him. I do not see how that sum of £895 could be disallowed to the first mortgagees as in fact it has been by Mr. Justice *Kekewich*, and I cannot exactly understand how the learned Judge of the Court below was led to the decision at which he arrived. The defence seems really to have been very much, if not entirely, directed to this, that the first mortgagees, selling under their power, employed a competent auctioneer, and were not answerable for any blunder which the auctioneer committed. There they were wrong, and that point was not I think argued before us. In all probability Mr. Justice *Kekewich* was led to the judgment which he gave by the manner in which the case was presented to him, both by the Plaintiffs and the Defendants; but certainly we cannot agree with that judgment as being a right statement of the law. What we think is this,—that the first mortgagees are answerable for any loss which was occasioned by the blunder made by their auctioneer at the sale. It may be that there was no loss. It may be on the other hand that there was considerable loss occasioned by it, because as Mr. Justice *Kekewich* says—and I think rightly—in the case of a building estate like this, the question whether the roads were properly made throughout, and whether the things stated to have been done had in fact been done, was one of importance. He has found as against the first mortgagees that "the value of the misstatement must be taken to be this £895;" but I think that the value of the misstatement depends upon what would have been given by a purchaser for the property if it had not been stated as a fact that the roads had been kerbed and sewered. The loss occasioned is a matter of fact, and in my opinion therefore, the judgment is not right in treating the first mortgagees as answerable for this £895 as a sum which, but for their wilful default, they might have received. That being so, we cannot affirm, but must disaffirm, the judgment. The Plaintiff, when he found that we intimated our opinion against the view taken by Mr. Justice *Kekewich*, asked for an inquiry as to what the damages were; and that was not objected to on the other side. What ought to be done is, we think, to direct an inquiry. Lord Justice *Fry* has prepared the terms of the order which we are prepared to make, and this order he will read. We must ascertain what really was the loss occasioned by this misstatement. In our opinion the first mortgagees, in exercising the power of sale, are answerable for that loss. In the minutes which Lord Justice *Fry* has prepared, he has dealt with the costs. The view taken in those minutes is, I think, a correct view. The first mortgagee has his costs up to and including the trial, then there will be this inquiry directed; and the minutes have been framed in such a way that it will not be necessary for the matter to come back to us; but in accordance with the result so the costs of the inquiry will be borne.

Fry, L.J.:—

Lord Justice *Bowen* has asked me to read the minutes. These are the minutes we have agreed upon:

The Plaintiff by his counsel admitting that the disallowance of £895 cannot be maintained, and asking in lieu thereof for the inquiry hereinafter directed, and the Defendants not objecting to such inquiry, vary the judgment of Mr. Justice *Kekewich*, and as varied let the judgment stand as follows: This Court doth order that the following inquiry and accounts be taken, that is to say,—First, an inquiry whether the lots 2, 3, and 4, would have sold for any and if any, what sum, in excess of the sum of £19,905, being the sum of £20,800, less £895, in case the same had been sold without the misstatement contained in the particulars in the pleadings mentioned. Secondly, an account of what on the 5th of May, 1887, was due to the Defendants under and by virtue of the indenture of mortgage dated the 26th of October, 1883. Thirdly, an account of the Defendants' costs of this action up to and including the hearing before Mr. Justice *Kekewich*. Fourthly, an account of the proceeds of sale of the hereditaments comprised in the said indenture of mortgage, received by the Defendants, or by any other person, or persons, by the order or for the use of the Defendants. And this Court doth declare that in case it shall appear upon the inquiry No. 1 that the said lots would have sold for any sum in excess of the sum of £19,905, then the costs of the said inquiry are to be borne by the Defendants; but if it shall appear that the said lots would not have sold for any sum exceeding the sum of £19,905, then the said costs are to be borne by the Plaintiff. Let the smaller of the two following sums be deducted from the larger of them, and the balance thereof certified, that is to say, first, the amount of the proceeds of sale, as certified on account No. 4, together with the sum, if any, which may be certified in answer to inquiry No. 1, and secondly, the sum due on the indenture of mortgage as certified in answer to account No. 2. Let interest be computed upon the said balance at 5 per cent. per annum from the 5th of May, 1887, and certified accordingly. Let the Plaintiff be charged with the amount of the account No. 3 (that is, the costs up to and including the hearing). And to, or from, the said balance or interest, let the costs of the said inquiry be added or deducted as the case may require; and let the ultimate balance according to all the said declarations and directions be certified. Liberty to apply in chambers for payment of such balance, and in respect to any costs not dealt with by this order. No costs of the appeal.

BOWEN, L.J.:—

I am of the same opinion as Lord Justice *Cotton*. I agree with the order as framed by Lord Justice *Fry*. I do not agree with the judgment of the Court below, or with the reasoning of it. The true measure of damages—or the true measure of allowance I ought to say—is that which has been stated by the Lord Justice and embodied in the order. The only point upon which I have some hesitation is this: I am not certain, if I had been sitting by my own unassisted—I will not say light, but twilight—that I should have come to the same conclusion as to the costs of the trial below. But it is a matter with which my Brothers are so much better fitted to deal than I am that I willingly yield my view about it to theirs.

FRY, L.J.:—

I am of the same opinion. It does not appear to me that the reasoning of Mr. Justice *Kekewich* can be maintained. I am not able myself to follow it. I think the learned counsel who appeared for the Respondents are quite right in the course which they took in not insisting upon maintaining the judgment as it stands. Then arises the question of inquiry; and as to this we were relieved of much difficulty by the Appellants' counsel not objecting to that inquiry. The case was evidently in a very entangled condition—partly by reason of the way in which it had been conducted in the Court below, and partly by reason of the admissions which seem to have been made on both sides—but, under the circumstances of the case, I think that the judgment the minutes of which I have already read is the right one for this Court to pronounce.

With regard to the question of costs in the Court below I agree with Lord Justice *Cotton*, and for this reason. It appears to me that the Plaintiffs came with an entirely false view of their case, their pleadings stating a claim to £895 as a specific disallowance; and they claimed to have an account taken as against the first mortgagees upon the footing of wilful default. They not only put that forward in their pleadings, but they seem to me to have put that, as a case, before the learned Judge; and I think they were entirely wrong in this case until the moment when Mr. *Neville* asked for the inquiry in lieu of the disallowance of £895. I think, therefore, that they were absolutely wrong at the hearing before the learned Judge; therefore, I think they ought to pay the costs up to, and including, that hearing. The subsequent costs caused by the inquiry we deal with by making them follow the event. Under the circumstances no costs of the appeal.

Solicitors for Respondents: *Lane, Monro, & Soutter.*
Solicitor for Appellants: *J. Thairlwall.*

W. W. K.

C. A.
1889
Dec. 10.

NIEMANN *v.* NIEMANN.

[1889 N. 1692.]

Partnership—Deed of Dissolution—Power of one Partner to compromise Debts—Power to accept Shares in satisfaction of Debt—Powers of Receiver.

There is no power in one partner, in the absence of special authority from his co-partners or evidence of a special course of dealing, to accept shares in a company even though fully paid up in satisfaction of a debt due to the firm. Nor has the Court jurisdiction in an action for winding-up the partnership, to confer on a receiver greater powers in this respect than a partner would have had.

Weikersheim's Case (1) explained and distinguished.

THE Plaintiff *C. G. A. Niemann* and the Defendant *H. W. F. Niemann*, his brother, were partners as merchants in *Fenchurch Street*. By an indenture dated the 3rd of June, 1887, it was agreed that the partnership between them should be forthwith dissolved and that the Defendant should take on himself the whole burden of the liquidation of the firm and the payment of the creditors, and should indemnify the Plaintiff against the claims of the creditors; that neither of the partners should make any claim upon the other in relation to the partnership, but the Defendant should pay and account to the Plaintiff for his share of any dividends which might be received in respect of any debts or claims which should be received by him, after all the creditors of the firm should have been paid.

The only important asset of the partnership which had not been realized was a debt of about £29,000 due from Messrs. *Bultzingslowen & Co.* of *Java*, all of whom were dead, and the estate of the surviving partner was insufficient for the payment of his creditors. It was proposed to form a limited company in *Amsterdam* to work certain sugar factories and coffee estates in *Java*, and to allot the firm of the Plaintiff and Defendant fully paid-up shares in satisfaction of their debt. The Defendant approved of this arrangement and intended to accept it under his powers for winding-up the partnership. The Plaintiff objected to this course, and brought the present action against the Defendant claiming to have the partnership wound-up under the direction of the Court, and an injunction to restrain the Defendant from compromising or settling the claim on the estate of *Bultzingslowen & Co.* without the consent of the Plaintiff, and for a receiver.

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(1) Law Rep. 8 Ch. 831.

The Defendant, having appeared in the action, immediately moved before Mr. Justice *Kekewich* that he might be authorized by the Court to carry out the proposed compromise, or that he might be appointed receiver to get in the outstanding debts of the partnership. The motion was supported by affidavits that the arrangement would be a very beneficial one and the only way of realizing any part of the debt.

His Lordship expressed his approval generally of the proposed compromise, and ordered, upon £2000 being paid into Court by the Defendant as security for the eventual share of the Plaintiff under the deed of dissolution, that the Defendant should be appointed receiver with liberty to compromise the claim in question upon terms to be approved by the Judge in Chambers; the Defendant to produce details of the scheme of compromise.

The Plaintiff appealed from this order, and by special leave the appeal was heard the next day.

Cozens-Hardy, Q.C., and *C. James*, for the Appellant:—

The Court had no jurisdiction to authorize the Defendant to enter into the proposed arrangement. It could not give him more power as receiver than he had under the deed of the 3rd of June, 1887. By that deed he was authorized to wind up the partnership without the interference of his co-partner, and he might perhaps have power to effect a reasonable compromise of a doubtful debt by accepting a smaller sum than was due. But this arrangement is not a compromise, it is a scheme by which the two partners will become members of a new speculative company in a foreign country and subject to unknown liabilities. There is no precedent for such special power being given to a receiver. In *In re Crawshay* (1), Mr. Justice *North* refused to sanction such a scheme in an administration action.

(1) W. N. (1888) p. 246.

Napier Higgins, Q.C., and *Ingle Joyce*, for the Defendant:—

The Plaintiff cannot complain of a receiver being appointed, for he asks for it in his writ. The only question is whether the Court has gone beyond its powers in giving the receiver the authority to make this arrangement. The terms of the arrangement are to be discussed in Chambers and to be sanctioned by the Judge, and the Judge will take care that the Plaintiff is relieved from all personal liability in the new company. A receiver can always accept a compromise of a smaller sum than is properly due, and why should he not be able to accept money's worth as well as money? In *Weikersheim's Case* (1) it was held that one partner could bind the firm by accepting shares as security for a debt: *Lindley* on Partnership (2). In *West of England and South Wales District Bank* v. *Murch* (3) an executrix was held to be justified in accepting paid-up shares and debentures of a company in lieu of the purchase-money of part of the estate. Therefore, independently of his appointment as receiver, the Defendant would have been justified in making the proposed arrangement under the terms of the deed of June, 1887.

Cozens-Hardy, in reply.

COTTON, L.J.:—

This is an appeal against an order made by Mr. Justice *Kekewich*, who ordered to be wound up in what he considered the best way the partnership in dispute here. The action was brought to take the accounts of the partnership and for a receiver; the Plaintiff and Defendant being partners and having carried on a business which a few years ago was dissolved by agreement. What the Judge has done has been to appoint a receiver, but he has appointed a receiver with liberty to come before him for the purpose of discussing the terms of a proposed arrangement to be entered into. There is a large debt due to the firm which has not been paid, and of which the Defendant says that he has no chance of getting payment except by the arrangement which he desires to carry out. He has filed an affidavit which contains what may be called a skeleton of the

(1) Law Rep. 8 Ch. 831. (2) 5th Ed. p. 141. (3) 23 Ch. D. 138.

arrangement, and he says that they have a very large claim on a certain firm, but that there are many other creditors, and that the only way of getting anything is to enter into an arrangement to form a company which will take over the property, and that certain shares will be handed over to the different creditors. That is in fact all that is stated in the affidavit of the Defendant. To-day we get a detailed statement, from which it appears that there is to be, not a limited company in *England*, but in *Holland*. We have no evidence what a limited company in *Holland* is, but it is said to be a limited company. Well, this is strongly objected to by the Plaintiff, one of the partners in the firm, and he says that the learned Judge had no right or power to compel him to assent to a compromise to be entered into by the Defendant on these terms. I do not enter into the question whether it is properly called a compromise or not, but I hold that he had no power to authorize the Defendant to enter into such an arrangement. How does the Defendant justify it? He could not exercise the powers given to him by the deed made between the two brothers except under the authority of the Court, he must get the leave of the Court to do it, and the Court could not give any extra powers beyond the authority which he had as partner. The effect of the action was simply a limit on his power so as to prevent him exercising that power without the sanction of the Court. And then we come to the question whether the Court could sanction the agreement which he proposes to enter into. Is there anything in this deed which enables him to do that? I do not think it would be contended subject to one case quoted by Mr. *Ingle Joyce*, to which I shall presently refer, that there would be power for one partner, though he was the partner who was carrying out the winding-up the affairs of the partnership, to enter into such an arrangement unless some power was given him by the other partner; and here in this deed, which is laudably short, I cannot see anything which will give him any special power to enter into any arrangement like this; he is made the person to wind up the concern, he is to pay all the debts, and I think it prevents (though that question has not been much argued) the Plaintiff from interfering with the exercise of the powers given by this deed to the Defendant, his brother.

The Defendant is to take upon himself the whole burthen of the liquidation of the firm and payment of the creditors, and indemnify the Plaintiff against the claims of the said creditors, "and neither of the said partners will make any claim upon the other of them, but the said *H. W. F. Niemann*," that is the Defendant, "shall pay all the existing debts of the firm, and indemnify the said *C. G. A. Niemann*," that is the Plaintiff, "against the same, and shall also pay and account to him for the share of any dividends which may be received in respect of any debts or claims after all the creditors of the firm shall have been paid out of the existing assets of the firm." Well, that does not give him any special power as regards dealing with the assets, it only defines the burthen he undertakes, and so far as there are any indications there it shews that he would not have any authority to take shares in a new company, because the deed supposes *primâ facie* that what will be received by him in respect of the assets of the firm would be divisible as dividends between himself and his partner. I think that is valuable in this way: it looks to the firm being wound-up and the assets of the partnership being realised in the ordinary way, which would be to collect and get payment of whatever could be got—payment in full, or if not, payment of such sum as could be obtained. Then, has the Court any power to do what is proposed by appointing a receiver? Because that seems to be one most relied upon here on the part of the Respondent. It is very true the receiver is appointed on behalf of both the parties to the action, but it is only for carrying into effect on behalf of both of them those powers which are settled and determined by the contract between them. There is nothing to enable the Court to authorize the receiver to make a new contract between the parties, or to assume to himself that which by the contract between the parties is not given by one to the other. Therefore, in my opinion, it would be wrong to hold that the Court can, by appointing a receiver, enable the receiver to do that which it cannot authorize one partner to do against the will of the other. Then how does the case stand here? I do not enter into the question whether it is correct or not that this proposed scheme will give the most profitable result to the two partners if they like to accept it; the only question we have here is whether the Plaintiff, one of the partners, is right in saying that the Defendant has no power to do this, and the Court was wrong in purporting to give him authority to do it, for it is not merely a payment of a debt or a compromise of a payment of a debt, but it is sanctioning the Defendant to enter on behalf of himself and his partner into a speculation, in order if possible with others to work out the estate of a debtor of the firm in such a way as to produce a profitable result. In my opinion the Court has no power either to authorize the Defendant to do it without the appointment of a receiver, or to authorize the receiver to do it when the contract between the parties does not authorize it.

Then what ought we to do as regards this order? There is some little difficulty in it from this, that the order only purports to be the appointment of a receiver, and it was pressed upon us that the appointment of a receiver in consequence of the difficulties between the parties is almost of course, and, therefore, there can be no valid objection to that. I do not think one can quite deal with it in this way. The appointment of a receiver under this order was simply made for the purpose of enabling that scheme to be carried into effect, and the appointment of the Defendant as receiver was simply machinery for the purpose of enabling that to be carried out in such a way as that the Court might have control over it. I think Mr. Justice *Kekewich* was acting in the way he thought most advisable for the interests of both these parties, but in my opinion it was not right in the Court to authorize such a scheme to be carried into effect under the guise of compromising a claim on a debtor to the firm. The only thing, therefore, I think we can do is altogether to discharge the order, as it was made simply for that purpose, without prejudice to any other application to be made for the appointment of a receiver. I doubted whether it would not be best to leave the receiver as appointed, but to declare that this scheme could not be carried into effect; but I think as the sole object of appointing this receiver was to carry into effect the scheme which has been proposed, the best course is to discharge the order altogether, and that we must give the Appellant the costs of this appeal.

There is only one case which I think I ought to refer to, which was cited as an authority for what has been done, and that was *Weikersheim's Case* (1), and I refer to it especially because it was quoted as sanctioned by the opinion of Lord Justice *Lindley* in his book on Partnership (2). The case there was really this, that one member of a firm of bankers took as security, and brought into the name of the partners, shares in a company, which involved liability, and it was said that that is an authority in favour of the receiver here doing what he is proposing to do. When one looks at the case one finds this, that the Judges who decided it (*James* and *Mellish,* L.JJ.) were of opinion that in the business of bankers it was so ordinary to take shares in companies as a security for a debt that it was part of the implied contract between them; but then *James,* L.J., points out that in fact all the partners assented to this being done. I rather think that Lord Justice *Lindley*'s statement here has been a little misunderstood. He does say, "one partner has implied authority to accept, in the ordinary course of business, security for a debt due to his firm." I do not think there is any doubt about that. Then he goes on: "And where one member of a firm of bankers accepted as security for money due to the bank, shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories to the company." At first sight the sentence does look as if it did not refer to the authority of the partners in that case, but was a general statement of the law that there would be an implied authority to accept shares under those circumstances. But when we look to the case to which he refers we see that that was not its effect, and I cannot think that he intended to lay down as a general rule of law that what was done in *Weikersheim's Case* could be done on the ground that the Judges held in that case that a partner in a bank would have that implied authority; though they really decided it on the ground that in that particular case the partners had known and assented to what was done. I thought it right to mention this, because that statement in Lord Justice *Lindley's* book might

(1) Law Rep. 8 Ch. 831.

(2) 5th Ed. p. 141.

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mislead those who do not look at the authority referred to: which I always like to do even in a book like Lord Justice *Lindley's*.

In my opinion the Appellant is right, and the appeal must be allowed.

BOWEN, L.J.:—

I am of the same opinion. I think the decision turns on a very broad and a very short point, that here there is no power under the deed to do what is desired. It seems to me for the reasons given by the Lord Justice that the Court has no power to clothe a receiver with an authority which would wholly transcend the nature of the original arrangement between the parties. It does not seem to me to be necessary to decide that in no case can anything but cash be taken by way of compromise. One can imagine that it would depend on the circumstances of each particular case whether anything can be received as an equivalent for cash; but here it is really not a compromise at all, it is the mere substitution for the payment of a debt, of a speculation to take shares in a new and unformed company in *Amsterdam*, the object of which is by the employment of the assets to recoup the creditors. That is something far more than a compromise, and therefore I think it is not what the Court can impose on an unwilling partner.

I agree entirely with what has been said about *Weikersheim's Case* (1). The whole *ratio decidendi* there was what was the ordinary scope and authority of a partner in a banking business. It seems clear as soon as the judgments of *James* and *Mellish*, L.JJ., are referred to, that both base their view on the broad foundation of their commercial opinion as to what is the ordinary business of a banker, but *James*, L.J., assumes also as a reason in that particular case that the authority was not only to be implied from the scope of business of the partnership, but was actually an express authority conferred by the knowledge and assent of the other partner. That shews that *Weikersheim's Case* is not an authority for the proposition for which it was cited, and that the passage in Lord Justice *Lindley's* book, if it did imply that (and perhaps it does not) would be an oversight.

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(1) Law Rep. 8 Ch. 831.

FRY, L.J.:—

If I were not differing from the decision of the learned Judge below I should probably say nothing, but I will shortly state the reasons why I concur with my learned Brethren. The arrangement contemplated in this case is shortly of this kind, that the claim which the partnership had against the *Java* firm shall be given up to a new company which is intended to be formed, and that the partners in the old or dissolved firm shall become shareholders in a concern which is to be carried on with the property of the *Java* firm. In other words, instead of remaining creditors of the *Java* firm, they are to become partners by way of a limited company in the business of their debtors. That is the nature and whole scope of the arrangement proposed. Now, it appears to me that such an arrangement as that is not within the ordinary powers of a partner who is charged with the liquidation of a dissolved partnership. It is not necessary to say whether he is bound to receive all the property which he collects in the form of cash, or whether under some circumstances he may proceed in another way. That point does not require decision; but that he has power to enter into a company or partnership to carry on the business of the debtor to the firm which he is winding-up is, in my opinion, not the case. I think, therefore, that, looked upon from the general point of view, the contention cannot be successfully urged. Then, it is said that the deed of the 3rd of June, 1887, makes a difference, and that shews that the Defendant was to be made so completely the *dominus* of the winding-up that he has power to do this. I find nothing in that deed in support of such a contention. It appears to me only to contemplate an ordinary liquidation of the partnership affairs, with this exception, that the Plaintiff is not to interfere in matters of discretion arising in that winding-up. It does not clothe the Defendant with any larger power or any power of doing anything else than a liquidating partner might do. As has been already observed by Lord Justice *Cotton*, the third section of the deed which refers to the Plaintiff accounting to the Defendant for his share of any dividend received, looks as though the intention of the parties was that these outstanding claims were to be got in by way of receipt of dividends on the claim, and not by way of any such arrangement as is now proposed. In my opinion the appointment of the Defendant as receiver would not enlarge his powers, because whilst the Court, by appointing the Defendant receiver, protects his operations and gives him power of having recourse to the Court for assistance and advice, it does not enable him to do that which as against the Plaintiff the existing convention or agreement between the parties does not justify. I repudiate the notion that the Court has a general discretion to do what it thinks best for the parties in the winding-up of their affairs which are the subject of agreement and obligation between them. The argument urged upon us that the Court can do what it thinks best cannot hold. There appears to me to be no authority really cited in support of that contention. I will say nothing more about *Weikersheim's Case* (1) except that I entirely agree in the comments made upon it. With regard to the case pressed upon us, and, perhaps, especially, upon me of the *West of England and South Wales District Bank* v. *Murch* (2), I will only say that it has nothing to do with this case, as it appears to me. I will only state that the conclusion which I arrived at in that case (whether rightly or wrongly seems for the present purpose immaterial) was that there was a compromise by an executrix, and that that compromise came under *Lord Cranworth's Act.* It has nothing to do with the power of a receiver appointed in a suit the object of which is the winding-up the affairs of a dissolved partnership. I think, therefore, the order must be discharged, and that the order suggested by the Lord Justice is right.

COTTON, L.J. :—

The Appellant must have the costs both here and below.

Solicitors: *Druces & Attlee ; Hollams, Son, Coward & Hawksley.*

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(1) Law Rep. 8 Ch. 831.

(2) 23 Ch. D. 138.

M. W.

C. A.

1889.

KEKEWICH, J.

July 17, 18.

C. A.

Dec. 13.

GRAY *v.* SMITH.

[1888 G. 1371.]

Partnership—Interest in Land—Agreement to retire—Statute of Frauds—Rough Draft—More formal Document intended—Specific Performance—Right to use the Name of retired Partner.

G., *S.*, *& B.* were partners in trade under the firm of "*G.*, *S.*, *& B.*," and the partnership assets comprised leaseholds. *S.* and *B.* agreed with *G.* to retire from the business and to assign their respective shares to him, and *B.* signed and gave to *G.* the following memorandum: "Rough draft. Memorandum from *G.*, *S.*, *& B.* This is to record that in consideration of *G.* or his executors paying *B.* or his assigns the sum of £100 on the 1st of January, 1890, and the sum of £100 on every 1st of January for the nine succeeding years, *B.* agrees to withdraw from the firm of *G.*, *S.*, *& B.*" The parties intended that a more formal document should be prepared and signed by them respectively.

In an action by *G.* to enforce specific performance of the above agreement:—

Held, by *Kekewich*, J., that although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire and to assign his share in the partnership assets, is an agreement to assign an interest in land and must be evidenced by a sufficient memorandum within the *Statute of Frauds*. On appeal by *B.* this point was not argued, but the Court expressed approval of the decision.

Held, by the Court of Appeal (affirming the decision of *Kekewich*, J.), (1) that the memorandum signed by *B.* was a sufficient acknowledgment by him in writing within the statute, for it meant that he should retire at once, and implied that he should assign his share to *G.*, and that *G.* should indemnify him against the liabilities of the partnership; and that as the memorandum fairly comprised all the material terms between the parties it was an enforceable contract within the statute, notwithstanding that a more formal document was intended. (2) That as there was no express agreement to assign the goodwill, *G.* had no right to continue to use the name of *B.* by carrying on business under the old partnership name.

Levy v. *Walker* (1) distinguished.

BY deed dated the 2nd of February, 1885, the Plaintiff *W. Gray*, and the Defendants *F. Smith* and *H. C. Bennitt*, became partners in the business of soap manufacturers under the style or firm of "*Gray, Smith, & Bennitt*," for a term of ten years from the date of the deed, and upon the terms and conditions therein contained. Part of the partnership property consisted of leasehold premises, the lease being vested in the three partners.

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(1) 10 Ch. D. 436.

The business proved unsuccessful, and consequently negotiations took place between the Plaintiff and the Defendants in the month of May, 1888, having for their object the retirement of the Defendants from the firm. In the result it was agreed between the Plaintiff and the Defendant *F. Smith*, with the consent of the Defendant *H. C. Bennitt*, that the Defendant *F. Smith* should retire from the said firm, and should sell and transfer all his shares and interest therein to the Plaintiff upon certain terms. It was also agreed on the 31st of May, 1888, between the Plaintiff and the Defendant *H. C. Bennitt*, with the consent of the Defendant *F. Smith*, that the Defendant *H. C. Bennitt* should retire from the firm, and should sell and transfer all his share and interest therein to the Plaintiff, and thereupon the Defendant *Bennitt* wrote and signed and delivered to the Plaintiff the following document:—

"Rough draft. Memorandum from *Gray, Smith, & Bennitt*. This is to record that in consideration of *William Gray* or his executors paying *H. C. Bennitt* or his assigns the sum of one hundred pounds on the 1st of January, 1890, and the sum of one hundred pounds on every 1st of January for the nine succeeding years, *H. C. Bennitt* agrees to withdraw from the firm of *Gray, Smith, & Bennitt*."

The Plaintiff, in the faith and belief that the above agreement operated as a dissolution of the partnership, and that he had become the sole owner of the partnership assets, provided considerable sums of money to pay the debts of the partnership and to carry on the business, but in the month of July, 1888, the Defendant *H. C. Bennitt* repudiated his agreement and refused to execute any assignment to the Plaintiff of his share and interest in the partnership assets. Thereupon the Plaintiff commenced this action, and by par. 9 of his statement of claim alleged that "It was agreed on the 31st day of May, 1888, between the Plaintiff and the Defendant *Bennitt*, with the consent of the Defendant *Smith*, that the Defendant *Bennitt* should retire from the said firm and should sell and transfer all his share and interest therein to the Plaintiff in consideration of the Plaintiff undertaking to pay to the said Defendant £100 on the 1st of January, 1890, and £100 on every succeeding 1st of January for the nine following years." The Plaintiff claimed specific performance of the agreement, or, in the alternative, a dissolution of the partnership.

The Defendant *F. Smith* appeared to the writ, but did not put in a statement of defence.

The Defendant *H. C. Bennitt*, by his statement of defence, denied the agreement alleged by par. 9 of the statement of claim, and also pleaded that, if any such agreement was entered into, no memorandum of such agreement sufficient to satisfy the *Statute of Frauds* was ever signed by him, and he also counterclaimed for a dissolution. The action came on for trial before Mr. Justice *Kekewich* on the 17th of July, 1889.

The Plaintiff gave evidence at the trial that it was a term of the agreement between him and the Defendants that he should be entitled to use the firm of "*Gray, Smith, & Bennitt*" until the retiring partners had been paid out. Evidence was given on behalf of *Bennitt* to shew that the memorandum was only given subject to its being subsequently approved by his solicitors.

Warmington, Q.C., and *Upjohn*, for the Plaintiff:—

As regards the Defendant *F. Smith*, he has not resisted the Plaintiff's claim, and no relief is asked against him. As to the Defendant *Bennitt*, the Plaintiff is entitled to specific performance. If necessary, the rough draft is a sufficient memorandum; and, although it is common ground that a more formal document was intended to be prepared and executed, yet the draft contains all the essential terms between the parties.

H. Terrell, for the Defendant *H. C. Bennitt*:—

A partnership in land may be proved by parol evidence, but an assignment of a share in the partnership is an assignment of an interest in land and requires a memorandum in writing of the contract within the *Statute of Frauds*: *Lindley* on Partnership (1); *Ashworth* v. *Munn* (2); *Baxter* v. *Brown* (3); *Watson* v. *Spratley* (4).

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(1) 5th Ed. pp. 81, 343 *et seq.*

(2) 15 Ch. D. 363.

(3) 7 M. & G. 199.

(4) 10 Ex. 222.

This rough draft is not a sufficient memorandum. It does not contain all the material terms of the contract. No date is fixed for *Bennitt's* retirement: *Coslake* v. *Till* (1); *May* v. *Thomson* (2); *Wood* v. *Aylward* (3). There is no stipulation that *Bennitt* shall assign his share to the Plaintiff, or that the Plaintiff shall indemnify him against the debt and liabilities of the firm. All these are essential terms, and their omission invalidates the contract. Lastly, the parties never were at one. The rough draft was merely an incident of the negotiations. It is admitted that the parties contemplated the preparation and execution of a more formal document: *Rossiter* v. *Miller* (4).

G. Curtis Price, for the Defendant, *F. Smith*, submitted that he was entitled to his costs: *Hamer* v. *Giles* (5).

KEKEWICH, J.:—

I will first dispose of the important question, which is necessarily subdivided into several others, whether the Plaintiff is entitled to specific performance of the alleged agreement of the 31st of May, 1888. The first point raised upon that was, whether it was necessary for such a contract that there should be an acknowledgment in writing, signed by the party to be charged, within the meaning of the *Statute of Frauds?* The authorities, when looked into, seem to establish that you may have an agreement of partnership by parol, notwithstanding that the partnership is to deal with land. That was established by the case of *Forster* v. *Hale* (6), and in *Dale* v. *Hamilton* (7), *Wigram*, V.C., went a step further, and said that the same rule would hold good where the partnership was to deal exclusively with land, and he proceeded to apply it to such a case. But it does not seem to me to follow that an agreement for the dissolution of such a partnership need not be expressed in writing, or rather that there need not be a memorandum of the agreement for dissolution when one of the terms of the agreement, either expressly or by necessary implication, is that the party sought to be charged must part with

(1) 1 Russ. 376.
(2) 20 Ch. D. 705.
(3) 58 L. T. (N.S.) 662.
(4) 3 App. Cas. 1124.
(5) 11 Ch. D. 942.
(6) 3 Ves. 696; 5 Ves. 308.
(7) 5 Hare, 369.

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and assign to others an interest in land. That seems to me to give rise to entirely different considerations. In the one case you prove the partnership by parol; you prove the object, the terms of the partnership, and so on. But in the other case it is one of the essential terms of the agreement that the party to be charged shall convey an interest in land, and that seems therefore to bring it necessarily within the 4th section of the *Statute of Frauds.*

That brings me to the consideration of the next question in this case, viz., whether we have here a sufficient memorandum within the statute. I am, of course, now dealing only with the agreement between the Plaintiff and the Defendant *Bennitt.* Although the Plaintiff, one of the three partners, is suing on an agreement signed by Mr. *Bennitt* alone, another of the three partners, it is alleged on the pleadings that that agreement was entered into with the assent of the third partner, the Defendant *Frank Smith,* and he has not only admitted that by not pleading to the contrary, but has also appeared by counsel here and declared his wish loyally to carry out the agreement to which he assented. The agreement is signed by the only party sought to be charged. That being so, I see no reason why the Plaintiff should not sue on it, although *Frank Smith* is not made a co-Plaintiff. That gets over one difficulty. Then as to the agreement itself. It is written on the paper of the firm, and is stated to be a memorandum from *Gray, Smith, & Bennitt,* so that there can be no question about the firm and the business they were carrying on. Then what *Bennitt* by this document agrees to do is "to withdraw from the firm" in consideration of *Gray* or his executors paying him or his assigns £1000, by ten yearly instalments, the first instalment to be paid on the 1st of January, 1890. Therefore the fact that the money is to be paid at a future time appears clearly on the face of the document. Now what does a man mean when he agrees to withdraw from a firm? As I understand it, *Bennitt* says: "I agree to go out in consideration of the promise made to me of payment of a sum of money, which I do not stipulate shall be paid immediately. I am content to be paid by instalments." Why should I construe that as meaning, "I will go out at some time to be fixed between us," or as meaning, "I will go out when the money is paid"? I think I am bound to bring to bear on the construction of this document one's general knowledge of what business men do under such circumstances as existed here. The firm is in difficulties, and it is necessary to make arrangements for carrying on the business, or—to fail; and when it is decided between the partners that one of their number shall withdraw, in order to enable the firm to carry on business, it seems to me that the common usage among business men is such that the phrase means that the partner who is to retire, and no longer continue a member, shall go out at once. Therefore I can put no other construction on the words "agree to withdraw" than "I agree to withdraw from this particular date." That, in my opinion, is the proper and grammatical construction of the document, and I think that is fortified by the stipulation for payment by instalments of what I may call the purchase-money. If it had been a stipulation for payment of a lump sum, there might have been some ground for arguing—I do not say it would have been successful—that the withdrawal was not to take place until after that money was paid, but to construe this document as meaning withdrawing when all those instalments were paid would be, it seems to me, really reducing the agreement to an absurdity. I hold it means withdrawal at once. Then what does "withdraw" mean? "Withdraw" seems to me to infer plainly two things. First, that the withdrawing partner shall make over to the continuing partners all his interest in the partnership and in the partnership assets, whether there be real or personal estate, whether there be outstanding contracts, or anything of the kind. That seems to me to be clearly the first thing indicated by the term "withdraw." Secondly, it seems to me to mean—applying the ordinary rules of partnership law—that the continuing partners shall indemnify the retiring partner against all the liabilities of the firm from that time forth. They take the assets, they take the benefit of the contracts, they take the chances of success for the future, and they must keep him indemnified. By "indemnify" I do not mean executing any deed or giving any security, but that they must undertake the liabilities that are in abeyance. That seems to me to be perfectly plain on such an agreement beyond reasonable dispute. Well, if that be the proper construction of such a document, I get over two objections raised by Mr. *Terrell*, that there is nothing in this document about assignment of property, nor an indemnity against liabilities. The law, I think, implies both of them, and I have already said that, in my opinion, the grammatical construction of the document is, that it means withdrawal at once, as from this date. But it is said that it is an essential term of such an agreement that the time should be mentioned on the face of it, and therefore that this is not a good memorandum within the *Statute of Frauds*, because an essential term is omitted, and I have been referred to the principles and authorities, with which the Court is familiar, respecting specific performance of contracts for the sale and purchase of land. The Court has continually held that time is not of the essence of the contract in the ordinary case of the sale and purchase of land, and for this reason—the Courts of Equity have overlooked the details of contracts, and have seen, more clearly than originally the Common Law Courts did, the real contract between the parties, namely, that there should be purchase and sale, and have regarded the time fixed for completion as a detail which was only introduced for the sake of convenience to indicate when the parties should come together, and not as an essential part of the bargain between them. Then on the general rule exceptions have been engrafted; that where time has been stated to be of the essence of the contract, the parties shall be held to that, unless, indeed, they themselves depart from it; and also where, having regard to the peculiar character of the thing proposed to be bought or sold, the Court considers the time mentioned to be of the essence of the contract. A familiar instance of that is the sale of a public-house, of which the case of *Coslake* v. *Till* (1) is an example. But it is an entirely different thing to say that because the agreement is silent as regards the time, which the parties have not thought fit expressly to mention, yet the time shall be regarded as such an essential term that the contract is not good without its being mentioned. That seems to me to break entirely new ground, and the only authority which

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(1) 1 Russ. 376.

Mr. *Terrell* was able to find in the slightest degree bearing on it was the case of *May* v. *Thomson* (1), which was an agreement for the sale of a medical practice, in which there was no express mention of the time for the completion of the bargain. In that case *Jessel*, M.R., says (2) that the sale of a medical practice "is the selling of the introduction of the patients of the doctor who sells to the doctor who buys; he has nothing else to sell except the introduction;" and then he says (3), "Nor is there any term stating the time from which the purchase should begin. That is a very important point, especially where the vendor is in failing health, but that is never assented to; there is negotiation about it, and different periods are named, but the exact time is never fixed." And no doubt he considered that to be an essential part of the particular bargain. That appears to me to bear a very close analogy to the cases of contract to grant a lease. A lease is a term which has a beginning and an ending, and it is now settled that unless you have both the beginning and the ending appearing on the face of the agreement you cannot possibly tell what the term is, and therefore you have not those essential parts which enable you to say what the contract is. A doctor who is retiring contracts to introduce his patients from a certain time. From when? If that does not appear you have not got an essential term of the bargain any more than when you have an agreement to grant a lease without any expression of the time when the lease is to commence. Those seem to me to be cases entirely different from what we have here, where there is not the slightest difficulty in saying when the Defendant *Bennitt* shall withdraw from the partnership. There is nothing to be done, so far as he is concerned, but to withdraw, and fulfil the stipulation, and everything else can relate back to the date when the agreement was signed. I see no difficulty on that point at all.

But there is one more point which deserves consideration. This document is headed "Rough Draft," and it is said that it was intended to be only introductory to a more formal document to be settled by the solicitors. Now there is no question about what was intended. There is no doubt whatever on the evidence

(1) 20 Ch. D. 705.
(2) 20 Ch. D. 718.
(3) 20 Ch. D. 720.

that the parties did intend that there should be a formal document, and it is essential that there should be such, because there were many things to be done which could only be done by a formal document, which solicitors would in the ordinary course of business prepare. But does that get rid of the difficulty? There have been several cases on the point, and the exposition of the law is to be found in the case of *Rossiter* v. *Miller* (1), where Lord *Cairns* deals at large with the subject; but for the present purpose I prefer to refer to what Lord *Blackburn* says (2): "Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement." And the question really that I have to determine on the evidence is, whether there was that intention between the parties here; because if there was not that intention, and the memorandum contains all the essential terms, then, according to *Rossiter* v. *Miller* and other cases, the mere fact that a further agreement was contemplated, and some more formal document intended to be prepared and settled by the solicitor, does not make the slightest difference. In the first place, it is said that this is a "rough draft," and no doubt it is, but I think it would be giving a great deal too much weight to two words to hold that they really prevent the Court regarding the document as a signed agreement, especially when one remembers that there is no reason why a draft, however rough, should not be signed by partners, as the final one agreed. Then as regards the substance. It is common ground that what they had agreed to was fairly and truly expressed in this memorandum, and beyond that there really is nothing except that it had to be reduced into a more business-like shape. It seems to me

(1) 3 App. Cas. 1124.

(2) 3 App. Cas. 1152.

that that takes the case out of the class mentioned by Lord *Blackburn*, where parties have entered into an agreement with the intention of having it hereafter reduced into terms by deed or otherwise, and that there is a binding and enforcible contract between these parties. I think therefore there must be a declaration that the Plaintiff is entitled to specific performance of the agreement, with consequent relief; and the Defendant *Bennitt* must pay the Plaintiff's costs of the action. As regards the costs of the Defendant *Smith*, inasmuch as he has carried out his part of the agreement, and no relief is asked against him at the Bar, and the action is in fact an action for dissolution of the partnership, and the Plaintiff takes the assets, the Plaintiff must pay his costs, and they are not to be included in the costs to be paid by the Defendant *Bennitt*.

The judgment declared "that the Plaintiff is entitled to have the agreement dated the 31st of May, 1888, in the 9th par. of the statement of claim mentioned, specifically performed by the Defendant *H. C. Bennitt*, but that the Plaintiff is not entitled henceforth to make use of the name of the said Defendant, and doth adjudge the same accordingly." It was ordered that all proper deeds for giving effect to such last mentioned agreement, should be settled by the judge. It was declared that by the agreements the partnership was dissolved from the 31st of May. *Bennitt* was ordered to pay the costs of the Plaintiff, and the Plaintiff to pay the costs of *Smith*.

C. A.

Bennitt appealed from this judgment, and the Plaintiff gave cross notice against that part of the judgment which prohibited his using *Bennitt's* name.

H. Terrell, for *Bennitt's* appeal:—

(1.) I contend that there was no complete agreement—nothing but negotiation. The Plaintiff by his own account says there were terms of agreement which were not embodied in the memorandum, for he says that he was to be at liberty to use *Bennitt's* name, and was to indemnify him. On the evidence, no concluded agreement was come to, the rough draft being subject to the approval of *Bennitt's* solicitor. (2.) Supposing an agreement was come to, it was an agreement within the 4th section of the *Statute of Frauds,* since the firm had landed property. Mr. Justice *Kekewich* decided in my favour as to this question, so I pass it by for the present, unless the Court wishes me to address myself to it now. (3.) If the contract is within the *Statute of Frauds,* there is no sufficient written memorandum to satisfy the statute. In order to satisfy the statute the memorandum must express all the material terms of the agreement. Here the memorandum does not say that *Bennitt* is to assign his share in the assets to *Gray.* Perhaps, however, that may be implied in an agreement to retire from a firm. But the memorandum says nothing about indemnity, though it is deposed to that the Plaintiff was to indemnify *Bennitt.* A covenant to indemnify cannot be implied, and what was the nature of the indemnity to be? The memorandum is silent on this.

[THE COURT suggested that there might be an implied obligation to indemnify—as in the sale of a leasehold or of an equity of redemption.]

If an obligation to indemnify can in some cases be implied, I submit that it cannot in this: *Bainbridge* v. *Kinnaird* (1). What the retiring partner assigns is his share in the assets subject to the debts, but the debts may exceed the assets.

Crackanthorpe, Q.C., and *Upjohn,* for the Plaintiff, were not called upon as to *Bennitt's* appeal, but opened the cross appeal:—

The restraint upon using *Bennitt's* name as it stands will be most prejudicial to the Plaintiff—it will prevent his selling off the old stock of tablets of soap which are stamped with the name of the firm, "*Gray, Smith & Bennitt,*" and will prevent his using the old stamps and the old advertising boards, which will have to be replaced by others at a considerable expense. We cannot rely on any express agreement for liberty to use *Bennitt's* name, no such agreement being referred to in the memorandum, but we say that the continuing partner, having become entitled to the whole business, is entitled to go on using the name of the firm: *Levy* v. *Walker* (2).

(1) 32 Beav. 346.

(2) 10 Ch. D. 436.

[COTTON, L.J.:—The use of the name "*Charbonnel*" could not lead the world to suppose that Mr. or Mrs. *Levy* was a partner.]

Banks v. *Gibson* (1) shews that the goodwill, which included the use of the name, is part of the assets, and in the absence of agreement may be used by any person entitled to a share in the assets.

Curtis Price, for *Smith*.

COTTON, L.J.:—

The first appeal to be considered is that of the Defendant *Bennitt*. His first point is that there was no concluded agreement at all, and that the memorandum was only given subject to its being approved by his solicitors. I agree with Mr. Justice *Kekewich* in thinking that this was not so. The evidence shews that the parties intended to have a formal agreement drawn up, and the drawing it up they would leave to their solicitors. But they did not intend to leave to their solicitors whether they should make an agreement, but only how the agreement they had made should be carried out. *Bennitt's* evidence does not appear to me to support his contention, and the form of the document, which is not in the shape of a proposal, but distinctly states an agreement to have been entered into, is strongly against his argument.

The Appellant next contends that the agreement is within the 4th section of the *Statute of Frauds* as being an agreement relating to an interest in land, and that the memorandum in writing is insufficient to satisfy the statute on the ground that it does not include all the material terms of the agreement alleged to have been entered into. We have not heard any argument on the former point, but as at present advised I agree with Mr. Justice *Kekewich* that the agreement is within the 4th section, so that a memorandum in writing is necessary. But is the memorandum insufficient? When a memorandum is intended to be worked out by a more formal document it is not necessary that every stipulation which would be contained in the latter document should be indicated, but the memorandum must contain all the essential terms of the agreement. It is urged that there is no stipulation that *Bennitt* shall assign his share in the assets, and that there is no stipulation that he shall be indemnified. But I think that any person instructed to carry out an agreement that a partner should retire from the firm would carry it out by making him assign his share in the assets, including his share in the leaseholds. What the retiring partner is to assign is not what would be coming to him on a winding-up, but his share in the assets in their existing state; and a right to indemnity against the rent and covenants of the leases and against the debts of the partnership is implied from the nature of the agreement, and need not be stated in the memorandum. It was urged that it was necessary that the terms of the indemnity should be stated. That argument would go to this—that if the memorandum had said that full indemnity should be given, without stating its nature or terms, that would not suffice. I cannot agree with this. In my opinion in the absence of express stipulation for anything else a covenant by the Plaintiff would be the proper indemnity.

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(1) 34 Beav. 566.

Then the Appellant says that the Plaintiff relies on an alleged stipulation that he should be at liberty to use the Appellant's name. The Judge below has not given the Plaintiff a right to do so, and the Plaintiff now does not insist on any right to use the Defendant's name beyond such right (if any) as according to the general law is to be inferred from the agreement to retire. The absence of such a term cannot therefore be treated as an objection to specific performance of the agreement if otherwise complete.

It is urged that the memorandum is insufficient because it does not state the time at which *Bennitt* was to withdraw. I think the true construction of the memorandum is that he is to withdraw forthwith, and there is therefore no uncertainty.

Then as to the cross appeal of the Plaintiff, in my opinion the Plaintiff has no right to continue the use of the name of *Bennitt* in any way which might subject him to further liabilities, and Mr. Justice *Kekewich* has decided that the Plaintiff is not entitled to use the name. The Appellant says: "I take all the property of the firm, the goodwill is part of that property, and includes the use of the name of the firm." We must look to the contract and see whether there is any stipulation to assign the goodwill. A contract to retire from the firm has not the same effect as a contract expressly bargaining for the assignment of the goodwill. The agreement by *Bennitt* to withdraw from the firm entitles the Plaintiff to an assignment of *Bennitt's* share of the stock, but does not imply that the Plaintiff is to be at liberty to continue to use *Bennitt's* name.

As to *Levy* v. *Walker* (1), which was relied upon by the Plaintiff, there a gentleman of the name of *Levy* had married Mademoiselle *Charbonnel*, a partner in the firm of *Charbonnel & Walker*. Mr. and Mrs. *Levy* could not be subjected to any liability by the use of the name of "*Charbonnel & Walker*" by the defendant, as the use of that name could not suggest to any one that Mr. or Mrs. *Levy* was a partner. Then there was an agreement for the sale of the leasehold premises, trade fixtures, stock-in-trade, goodwill and business as a going concern to Miss *Walker*. That was quite different from the present case, where there is only an agreement by a partner to retire from the firm. In that case it was held that the contract for sale of the goodwill included a right to use the name of the firm. Here there is no such contract.

BOWEN, L.J., concurred.

FRY, L.J.:—

I am of the same opinion. We all of us, however, think that it is desirable to modify the declaration as to the use of *Bennitt's* name, so as to shew that it is not intended to prevent the Plaintiff from disposing of the existing stock which bears the name of the firm.

Solicitors for Plaintiff: *Torr, Janeways, Gribble, & Oddie*, for *Dibb & Clegg, Barnsley*.

Solicitors for Defendant *F. Smith*: *Pilgrim & Phillips*, for *Smith, Smith, & Co., Sheffield*.

Solicitors for Defendant *H. C. Bennitt*: *Indermaur & Brown*, for *F. W. Fisher, Doncaster*.

H. C. J.

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(1) 10 Ch. D. 436.

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KEKEWICH, J.
June 19, 20.
C. A.
Dec. 20.

PHILLIPS *v.* CAYLEY.

[1889 P. 335.]

Execution of Power—Exclusion of Will—Express Reference—General Bequest—Wills Act, s. 27 [*Revised Ed. Statutes, vol. viii., p.* 35].

Under an indenture of settlement trustees were to hold a sum of railway stock for such persons as the settlor should by writing under his hand (not being a will or codicil), or by a will or codicil expressly referring to the power, appoint.

The settlor by will bequeathed his personal estate to trustees, not making any reference to the power:—

Held (by *Kekewich*, J., and by the Court of Appeal), that this bequest did not operate under sect. 27 of the *Wills Act* (1 Vict. c. 26) as an execution of the power.

In re Marsh (1) overruled.

BY an indenture of settlement dated the 4th of June, 1884, *H. R. Phillips* declared that the trustees therein named should stand possessed of £7060 preference railway stock, "upon trust for such person or persons and for such purposes as the said *H. R. Phillips* shall at any time or times, or from time to time, by writing under his hand (not being a will or codicil), or by a will or codicil expressly referring to this power, appoint. And in default of and subject to any appointment under the power hereinbefore contained" upon the trusts thereinafter mentioned.

H. R. Phillips died on the 10th of September, 1886, having by his will dated the 12th of June, 1879, given and bequeathed his personal estates and effects to his three trustees and executors upon trust for conversion, and for payment of his funeral and testamentary expenses, debts, and legacies. The testator made four codicils to his will (the last dated the 7th of June, 1884), which did not alter the above-mentioned general bequest of personal estate, except by varying the trustees and executors. Neither the will nor the codicils contained any reference to the power in the settlement.

G. Phillips and *H. Phillips*, who claimed under the settlement in default of appointment, issued an originating summons asking that it might be declared that the will of *H. R. Phillips* did not operate as an exercise by him of the power of appointment reserved to him by the settlement; and that the trusts of the settlement might be carried into execution under the direction of the Court.

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(1) 38 Ch. D. 630.

The summons was heard by Mr. Justice *Kekewich* on the 19th and 20th of June, 1889.

Warmington, Q.C., and *Warrington*, for *G. Phillips* and *H. Phillips*:—

The question depends on the effect of sect. 27 of the *Wills Act*, and but for *In re Marsh* (1) it would seem clear that the will did not operate as an execution of the power. The words here prevent such a will from having any effect; and that has been the view taken by Mr. Justice *Kay* in *Charles* v. *Burke* (2), and by Mr. Justice *Chitty* in *Robinson* v. *Burke* (3).

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(1) 38 Ch. D. 630.

(2) 1888. Dec. 12. KAY, J.:—

In this case the testator made a will on the 12th of June, 1879, by which he did not affect to exercise any power of appointment of his leasehold property and personal estate and effects. On the 8th of January, 1880, he makes a settlement, by which he is desirous of making provision for *Harriett Charles*, widow, "and for that purpose has transferred or will shortly after the execution of the settlement cause to be transferred into the names of *Sandford* and *Burke* the sum of £1766 13*s.* 4*d.*, £3 per cent. Consolidated Bank Annuities to be held by them upon the trusts hereinafter declared thereof." Then the deed witnesses that he declares and directs and the trustees declare and agree that the trust premises shall be held by them on the following trusts, "that is to say, upon trust that they, the said *Henry Sandford* and *John Burke* and the survivor of them and the executors and administrators of such survivor do and shall assign, transfer, alter, vary, sell, dispose of or otherwise deal with the said trust premises and the dividends, interest, and annual proceeds thereof, and the stocks, funds, and securities into or upon which the same trust premises shall be from time to time invested in such manner in all respects as the said *Henry Richards Phillips* shall from time to time by any writing or writings revocable or irrevocable under his hand, attested or unattested (but not by his last will and testament or any codicil thereto unless he shall expressly refer to the said trust fund and premises), order and direct by which writing or writings the trusts of these presents may be absolutely revoked, annulled, altered, varied, or otherwise dealt with at the free will and pleasure of the said *Henry Richard Phillips*, and subject to the said trust "to pay the income to this lady for her life, and after her death in trust for her children, and if

(3) 41 Ch. D. 417.

Barber, Q.C., and *Allen*, for *G. Allen*, the only one of the executors who was not also a trustee of the settlement:—

The cases before Mr. Justice *Kay* and Mr. Justice *Chitty* are

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there should be no children, then in trust for the settlor.

Having made that settlement, he executed three codicils, and then on the 4th of June, 1884, he under that power somewhat modified the trusts of the settlement, but it is not material for this purpose, because after the modification he still had the same power which the original settlement gave him. He made a fourth codicil dated the 7th of June, 1884, and he died on the 10th of September, 1886. The trustees of the settlement went on paying the income to the persons entitled under the trust, and the question is, whether under the provisions of the will the will had not operated as an exercise of this power, and it was suggested pretty broadly that the trustees could no longer pay the income to the persons entitled under the settlement.

The section of the *Wills Act* referred to is the 27th section, and it is the latter part of that section under which this will is to be regarded. I am told, and it is argued, that this will does exercise this power, and further that whatever restriction is put upon the power by the settlement it is exerciseable by will and exerciseable in favour of any person whom the testator may choose to make an object of his bounty as appointee, and then the will by the force of the Act exercises that power. If that were an open question, it would be capable, in my mind, of very considerable argument. I will not say any more about that, because I am referred to a recent decision in which that seems to have been dealt with. But then under this clause of the *Wills Act*, it is contended that if there be a settlement or any other deed declaring certain powers of revocation, then a general bequest by a person who has the power operates as an exercise of that power. It seems to me to be quite the contrary. In *Pomfret* v. *Perring* (5 D. M. & G. 775) we find this important distinction. [His Lordship then stated the facts of that case and recapitulated the arguments and the conclusions.]

That case came before Sir *John Romilly* in *Palmer* v. *Newell* (20 Beav. 32, 38), and he said, "I am of opinion that *Pomfret* v. *Perring* is an authority shewing, that although a will does, by virtue of the statute, operate as a general exercise of all powers of appointment, yet that it does not operate as an exercise of a power of revoking a previous instrument." I can only say that that seems to me to be a most reasonable restriction to put upon this general provision in the *Wills Act*, because although no doubt you may exercise the power of revocation by simply appointing, if you refer to the power, yet you have a double operation to go through, you revoke and reappoint, and the fact of such an appointment does revoke a previous instrument and make a new appointment.

Now taking it to be the law, a law by which in that state of authority I hold myself to be bound and from which I see no reason to dissent, that this power in the clause of the *Wills Act* does not apply to a power of revoking a settlement, and that a general devise or bequest does not exercise a power of that kind, then I turn to this settlement again and ask myself, is not on the same form of power. Unless on the face of the will there is an intention not to exercise the power, effect is to be given to sect. 27 of the *Wills Act: Boyes* v. *Cook* (1); *In re Clark's Estate* (2). The Legislature has thought fit to make a rule, and this settlement is an attempt to evade it and to nullify the statute. Lord *St. Leonards*' opinion is against it: *Sugden* on Powers (3). A reference to the power is merely one of the forms included in sect. 10 of the *Wills Act*, and there dispensed with. However hard and contrary to the probable intention of the testator it may be, the *Wills Act* must prevail: *Airey* v. *Bower* (4).

Bramwell Davis, for the other trustees of the settlement.

KEKEWICH, J.:—

I do not intend to consider the question whether there is a

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this a general power of appointment, or is it a power of revocation? I do not choose to exercise any judgment upon it which would be other than that which the settlor himself formed, because he said that this power is a power by which the trusts of these presents may be absolutely revoked, annulled, altered, varied, or otherwise dealt with. It is a general clause, and it is to be observed that it is a power which applies not only to the revoking of the settlement, but also to the investment of the money. It means this, "Whatever is done under this settlement shall be done under my direction both as to investment and revocation" — "they shall assign, transfer, alter, vary, sell, dispose of, or otherwise deal with the trust premises and the dividends, interest, and annual proceeds thereof, and the stocks, funds, and securities into or upon which the same trust premises shall be from time to time invested in such manner in all respects as I shall from time to time by any writing or writings revocable or irrevocable direct." And therefore it is an overriding power which means this, and is just to my mind as intelligible as if it had been introduced at the end of the settlement by way of proviso, "Provided always and I hereby declare that it shall be lawful for me to direct how the trustees shall invest, or to revoke the settlement and make a new appointment," and so on, and for this purpose it seems to me clearly that this is a power of revocation and new appointment. The Court is not bound to say that a general bequest whether made before or after this can exercise a power of this kind. Referring to the authorities I have mentioned, it seems to me to be exactly the other way, and I hold that this general bequest is not an exercise of this power, because the power is not a mere power of appointment, but is a power of revocation and re-appointment.

(1) 14 Ch. D. 53.

(2) Ibid. 422.

(3) 8th Ed. p. 306.

(4) 12 App. Cas. 263.

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contrary intention appearing by the will, because I do not think that that point really arises for decision in this case.

The combined effect of sects. 27 and 10 of the *Wills Act* as applied to a case of this kind is, that where a testator having a power to appoint in any manner he may think proper makes a general bequest of his personal estate, that general bequest operates as an execution of the power, and is not to be defeated by the power requiring in terms any additional or other form of execution or solemnity other than and besides that which is required by the statute itself. That being, as I understand it, the statutory provision, I have to consider whether the power has been properly exercised in the present instance. There is no question about the terms of the will, because there is a general bequest of personal estate, and nothing more or less. The difficulty arises on the terms of the power.

Now the power is a power of appointment by writing under hand (not being a will or codicil), or by a will or codicil expressly referring to the power. It seems to me that the testator divides writings into three classes: writings which are not testamentary, writings which, being testamentary, refer to the power, and writings which, being testamentary, do not refer to the power; and he has in, I think I may say clear language, said that the power may be exercised by either one of the first two, but not by the third. Is there anything wrong, or is there anything contrary to the statute in such a provision? Mr. *Barber* has argued, and no doubt truly, that it is an attempt to evade the statute, but that is a liberty which is open to all Her Majesty's subjects. The question is, whether he has evaded the statute—that is, has taken the case outside the provisions of the statute. If so, there is nothing wrong in so doing. Is it a power to appoint in any manner the testator may think proper? I should have thought, as a matter of language, that it was clearly not, and that when a settlement says, "You shall not appoint by a testamentary document not referring to this power, you shall appoint only by writing not testamentary, or being testamentary referring to the power," that is an exclusion of one class of writings, and therefore the generality required by the statute does not exist. It is not in that point of view a power to appoint in any manner which he may think proper.

To that it is answered that the words "any manner" are not to be construed with reference to the mode of exercise, but to the persons in whose favour it is to be exercised, and Lord *St. Leonards'* opinion is quoted in support of that view. This opinion is found in his work on Powers (1). In words he says something extremely like it, but it is not exactly that. He says: "It has been observed that the expression in the statute 'real estate, which the testator may have power to appoint in any manner he may think proper' is ambiguous"—that appears to be his Lordship's own observation—"but it refers to the extent of his power of disposition in regard to the objects, and does not require that the mode by which he may appoint should be unrestrained." Then he goes on to give a succinct report of the case of *Moss* v. *Harter* (2), which seems to me by no means to bear out the conclusion at which Lord *St. Leonards* arrived in the earlier part of the placitum. Indeed, I do not myself see exactly what immediate bearing that case has upon the point of construction, which is there noticed. But the statement of *Moss* v. *Harter* contradicts, as it seems to me, what is to be found in the few lines preceding, because Lord *St. Leonards* says, that "although a power is confined to a will, and cannot be exercised by act *inter vivos*, and consequently the property cannot be appointed, strictly speaking, in any manner the donee may think proper, yet the power falls within the provisions of the Act, for the will is an instrument within the provisions of the statute, by which instrument the donee may appoint in any manner he may think proper." I conclude from that that Lord *St. Leonards* must have thought, as certainly I think, that a power to appoint by deed or other writing not being a will is not a power to appoint in any manner so as to be exercisable by a will under the 27th section of the *Wills Act*. But for what is said in the preceding part of the sub-section I should have thought it was clear upon the face of it. I do not feel hampered by what Lord *St. Leonards* has there said, or by *Moss* v. *Harter*, a decision which has been referred to by the Court of Appeal in *In re Clark's Estate* (3), and by Mr. Justice *North* in the case which has been cited, but not with reference to this particular point.

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(1) Chap. vii. sec. 7, pl. 47.

(2) 2 Sm. & Giff. 458.

(3) 14 Ch. D. 422.

Holding, therefore, that "in any manner" does oblige the Court to distinguish between writings or deeds and testamentary documents, I consider that the testator here had not a power to appoint in any manner he might think proper, because one class of documents, namely, testamentary writings in which the power is not expressly referred to, were excluded from the exercise of the power.

Then is a reference to the power an additional or other form of execution or solemnity within sect. 10? In my judgment it is something quite different. It is not a form of execution or solemnity; it is something which must be in the body of the will —it must be part of the will—and I cannot see why a testator should not be bound to refer to the power without in any way contravening the general, and no doubt beneficial, intention of the 27th section.

That being my clear opinion on this matter if unfettered, I am met by the decision of Mr. Justice *North*, in *In re Marsh* (1), and that, no doubt, has raised considerable difficulty. Mr. Justice *North* certainly decided this point differently. It may be that the point was not fully discussed and argued. According to the report that seems to be the case, but I can hardly think that the point was not present to the learned Judge's mind, and certainly in a few words on page 633, and still more clearly in page 634, he does, to my mind, decide this question. He says: "The real question is whether those words in the settlement, 'expressly referring to this power or to the subject thereof,' can limit or modify the power which the law has given to the testator. I do not see how a statutory power can be limited in that way." He decided the case mainly upon the question of contrary intention, but he did express that opinion. This case was decided just twelve months ago. It has been in the LAW REPORTS, and circulated among the profession for some months, and under ordinary circumstances I should deem it my duty to simply follow the decision of a Judge of co-ordinate jurisdiction, either expressing or not expressing my own opinion according to what I thought best under the peculiar circumstances of the case. But here the circumstances are not ordinary. The question has been raised in another case before Mr. Justice *Kay*, and in a third case before Mr. Justice *Chitty*. Mr. Justice *Kay*, in *Charles* v. *Burke* (12th December, 1888) (1), avoided, as I venture to think a Judge is bound to avoid if he can, a difference from another Court of equal jurisdiction with his own, by deciding the point before him on different grounds which were satisfactory to his mind, and he expressly does so in his judgment, of which I have seen a note. He certainly did doubt very much the soundness of Mr. Justice *North's* decision. I cannot say more, and I cannot regard Mr. Justice *Kay* as having definitely differed from Mr. Justice *North*.

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(1) 38 Ch. D. 630.

Then in the case before Mr. Justice *Chitty*, *Robinson* v. *Burke* (2), it is quite true that he takes pains to say that there is a distinction between the case before him and the case before Mr. Justice *North*. It may be so, but it seems to me that the words of the power in the two cases were so exactly alike that the distinction is one of considerable difficulty. On the other hand, it is possible that the case was presented in such a way to the learned Judge's mind that he saw a distinction which does not occur to me. But there is no doubt whatever of his opinion, because while pointing out that it was distinguishable, he says this: "If it is not distinguishable, I should have felt myself in a little difficulty in holding that I was bound by that decision." That being so, I am not only at liberty to express my own opinion—a liberty which I might or might not exercise—but I think that I am bound to express it, and that it would be clearly wrong of me, notwithstanding that the case has been decided by one Judge, when I know that other Judges do not agree, to withhold from the suitors in a particular case, and from those interested in such matters, my opinion on the point. Therefore I have no hesitation in acting upon what my own opinion is, and that opinion differs—I say so in plain words—from that which I understand to have been expressed by Mr. Justice *North* in the case before him.

I must decide in the Plaintiff's favour.

C. M.

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(1) *Ante*, p. 223, n.

(2) 41 Ch. D. 417, 421.

G. Allen, as representing the testator's estate, appealed from this decision. The appeal was heard on the 20th of December, 1889.

Byrne, Q.C., and *Allen*, for the appeal:—

The case turns on the *Wills Act*, sect. 27. We contend that the section must govern, for that here the testator had power to appoint "in any manner he may think proper": *In re Marsh* (1). This is the view of Lord *St. Leonards* (2), who considers that the words "in any manner he may think proper" refer only to the extent of the testator's power of disposition with regard to the objects. That the testator was the settlor makes no difference, and the observation of Lord *St. Leonards* that he must shew an intention to defeat his settlement cannot be supported: *Airey* v. *Bower* (3); *Boyes* v. *Cook* (4); *In re Clark's Estate* (5); in which last case the remark of Lord *St. Leonards* is expressly dissented from. The only question is whether this is a general power within the meaning of sect. 27, and we say that on the authorities it is. "In any manner he may think proper" does not refer to the mode of execution, for a general power to appoint by will without any power to appoint by deed is within the section: *Hawthorn* v. *Shedden* (6); *In re Powell's Trusts* (7). In the case of *Robinson* v. *Burke* (8), Mr. Justice *Chitty* held that a power limited in a way similar to that in the present case was not exercised by a residuary bequest, but we submit that the contrary view taken by Mr. Justice *North* in *In re Marsh* is the correct one. In *Charles* v. *Burke* (9) Mr. Justice *Kay* went on another ground. *Pomfret* v. *Perring* (10) turned on the rule that a general bequest will not exercise a power of revocation and new appointment.

[COTTON, L.J.:—Suppose the power was to appoint by a will executed after *A. B.*'s death. Would a will made in *A. B.*'s lifetime exercise it?]

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(1) 38 Ch. D. 630.
(2) Sug. on Powers, 8th Ed. p. 306.
(3) 12 App. Cas. 263, 266.
(4) 14 Ch. D. 53.
(5) Ibid. 422.
(6) 3 Sm. & Giff. 293, 303.
(7) 18 W. R. 228.
(8) 41 Ch. D. 417.
(9) Ante, p. 223, n.
(10) 5 D. M. & G. 775.

In that case the power would not have arisen. The section must be construed as referring to a "power to appoint by will to any person he may think proper," and the settlement cannot be looked to as shewing "a contrary intention." That must be determined according to the terms of the Act from the will alone. A settlor ought not to be allowed to defeat the object of sect. 27 by expressions which he may insert in the power.

Warmington, Q.C., and *Warrington*, for the Plaintiffs:—

In order to support the Appellant's argument it is necessary for him to shew a statutory abolition of any restraints imposed by the donor of a power to appoint by will to any person whom the donee of the power thinks fit upon the exercise of that power. He can impose any conditions he thinks fit except so far as the statute nullifies them. Any attempt to interfere with the mode of execution is made void by sect. 10. Here, the question not being one relating to the mode of execution, the donor is left at liberty to impose conditions. The power is not a power to be exercised by any will, but only by a will satisfying a condition, viz., that it refers to the power, and this is not a general power within the meaning of sect. 27. Apart from the Act the will does not answer the description in the power, and there is nothing in the Act to dispense with its answering that description. The condition is a reasonable one, it was intended to prevent the power being exercised *per incuriam* by a general disposition when there was no intention to exercise it.

Allen, in reply.

COTTON, L.J.:—

This is an appeal on a point on which learned Judges have expressed contrary opinions, but in my judgment the decision appealed from was right. The question is, whether the will made by the testator in this case is a good execution of a power contained in a settlement executed by him on the 4th of June, 1884. I quite agree that according to sect. 27 of the *Wills Act* you cannot look for contrary intention except to the will itself. But there is something more in the case than that—the question is whether there is a power which enables this will to operate;

whether the settlement gives the donee "power to appoint in any manner he may think proper." A difficulty arises on these words, because they do not in terms refer to a power exerciseable by will. It is, however, conceded that if there were only a power to appoint by deed a will would not do, even although there is no limitation of the objects in favour of whom the power could be exercised, and it is also conceded that the section applies to a general power of appointment by will, though there is no power to appoint by deed. That I think is reasonable enough. This is an Act dealing with wills, and the object of sect. 27 is not to enable persons to appoint by will, but to make a general disposition in a will operate as an exercise of a power to appoint by will in any manner the testator thinks fit, though the testator does not expressly shew that he has an intention to execute that power. That does not go far enough to support the Appellant's case. Although a general power to appoint by will is sufficient, we must first see whether on the will there is a contrary intention, *i.e.*, an intention not to exercise the power. That is out of the question here. But then we must see whether the will is such as to come within the power, and, in my opinion, if there are any conditions or limitations imposed by the settlement creating the power, to which the Act does not prevent effect being given, we cannot disregard them. Now the Act in express terms prevents regard being had to any conditions attempted to be imposed as regards the mode of execution, but it does not refer to any other conditions. In the present case the settlor says in effect: "My settlement may be put an end to, and the property may be otherwise disposed of, by a will expressly referring to this power." Any other will—a will not expressly referring to the power—is not within that description, and as there is nothing in the Act to prevent such a condition being imposed I cannot see how under sect. 27 this will can be said to be a good execution of the power. In my opinion this decision is right.

BOWEN, L.J.:—

I am of the same opinion. The scope of sects. 10 and 27 is totally distinct. Sect. 10 provides that no appointment by will shall be valid unless the same be executed in the manner pointed out in a previous portion of the statute, and that every will so executed shall, as regards execution and attestation, be a valid execution of a power, although other formalities prescribed by the donor of the power may not be observed. Sect. 27 has nothing to do with forms of execution or other solemnities; it provides that general gifts under a will are to include property over which the testator has a general power of appointment, unless the will shews a contrary intention. In the present case we have to construe the words which occur in the second branch of sect. 27, which provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper." I think that the words "he may have power to appoint in any manner he may think proper" are equivalent to "he may have power to appoint by the will in question in any manner he may think proper." It appears to me that this is to be collected from the context, for the statute is dealing only with wills, and the section contains nothing to make any will operate as an exercise of a power which could not otherwise have been exercised by it; therefore you are not doing any violence to this section by reading those words in the sense I have mentioned. Now if that is the true construction of those words, it is obvious that in the present case the will does not answer to the description given in the power, and that is a fatal reason why the section does not apply. The statute is not intended to cure dissimilarities between wills and powers except so far as sect. 10 applies, which section has no bearing on this case. Here there is a dissimilarity between a will and a power which goes directly to the form of the will itself. It has been argued indeed that it is not right to allow a settlor by expressions in the instrument creating the power to escape from the intention of the statute. But the section which we have to interpret is not a prohibitory section. It is an enabling section, and I cannot see any reason why a man should not so frame his settlement as to exclude from the operation of that section any particular kinds of will. Why may not a man impose upon the will the condition that it shall expressly refer to the power? Suppose that a man were to go a little further than the settlor does in this case, and to say that the property is only to be appointed by a will in which the testator shall *nominatim* refer to the settlement, and refer to the parties who are parties to the settlement. If he chooses to make a strange condition like that, he surely may do so, and the donee of the power cannot escape from the obligation of that condition, and make an effectual appointment by a will omitting any reference to the matters which the settlor insisted upon as necessary to be mentioned in a will exercising the power. It seems to me that when this matter is argued out it is really quite clear, and I agree with the Lord Justice that the order under appeal is right.

FRY, L.J.:—

I am of the same opinion. The words we have to interpret are that a general bequest of the personal estate of the testator shall be construed to include any personal estate "which he may have power to appoint in any manner he may think proper." Now does that mean "*any* power to appoint in any manner he may think proper"? It does not, because if it did it would enable a person to appoint by will property which he had only power to appoint by deed. Does it mean "by any will"? I am of opinion that it does not, and for this reason, that if it did it might frustrate the intentions of the person who created the power. For instance, supposing a father on the 1st of June gave a power to his son to appoint by will to any person whom he might think fit, and in any manner he might think fit, provided that the will was executed after the 1st of January next, and on the 2nd of June the son made his will, and on the 3rd of June died. According to the argument of the Appellant, that will would have been a good exercise of the power, and the fetter which the father had a right to impose upon the power he was creating would be frustrated. Of course, if the Legislature had said that no such fetter should be imposed by the person who created a power, the Court must have yielded to it, but the Legislature has not said so, and it is not for us to invent fetters in the disposition of property.

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I entirely agree with Lord Justice *Bowen*, that this clause is not intended to deal with any relation between the power and the instrument by which it is to be exercised; it is intended to deal only with the exercise of the power by the will. Again, the fact that the 10th section expressly removes any fetters which the settlor may attempt to put on the mode of executing a will by which the power is to be exercised, seems to me to go far to shew that where that section does not apply, there was no intention to affect any fetter imposed by the creator of the power. I think therefore that the true meaning of the words "may have power to appoint in any manner he may think proper" is "may have power to appoint by the will in question in any manner he may think proper." The appeal therefore fails.

Solicitors for Plaintiffs: *Potter, Sandford, & Kilvington.*
Solicitors for Defendants: *Allen & Son.*

H. C. J.

KAY, J.
1889
Nov. 30;
Dec. 2.

In re THE BRISTOL ATHENÆUM.

Company—Literary Society—Trading Company—" Business"—Winding-up —Companies Act, 1862, *s.* 199 [*Revised Ed. Statutes, vol. xiv. p.* 247]—*Literary and Scientific Institutions Act,* 1854, *ss.* 30, 33 [*Revised Ed. Statutes, vol. xii. p.* 386].

Sect. 199 of the *Companies Act,* 1862, which deals with the winding-up of unregistered companies, is only applicable to trading associations, inasmuch as such unregistered companies are to be wound up at their "place of business," and "business" must ordinarily be trading under the Act.

Where a literary or scientific institution, not established for the purpose of gain, is dissolved by its members, its property ought to be given to some kindred institution, to be determined in manner prescribed in sect. 30 of the *Literary and Scientific Institutions Act,* 1854, even if the rules contain a provision that the property of the society on its dissolution is to be divided among its shareholders, such a provision being contrary to the Act.

Such an institution is not a joint stock company, although some of its members may be shareholders, and does not therefore come within the proviso in sect. 30 of the Act of 1854, which excepts from the operation of the section any institution "which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company."

PETITION.

The *Bristol Athenæum* was established in 1844 for the purpose of promoting "moral and intellectual improvement and social recreation by means of libraries for circulation and reference, newspapers and periodical publications, lectures, discussion, and classes for instruction and improvement in literature and the arts and sciences. The lectures to include theological and political science, but not party or local politics or controversial theology."

Under the original rules the society was to consist of donors of £20 and upwards (who were to be life members) and of £10 and £2 shareholders, and of annual subscribers of various sums. The property of the society was to be vested in five trustees, with power to sell or exchange such property for the benefit of the society at the request of the board of directors; and the rules were not to be altered unless by the authority of an annual general meeting, or a meeting specially convened for the purpose. At a special meeting on the 2nd of September, 1850, shares of

£20 and £5 were also created. Certain leasehold premises in *Bristol* were acquired by the society and were vested in trustees. In 1884 the trustees mortgaged these leasehold premises by way of sub-demise to secure the repayment of £1750. In August, 1888, the mortgagee sold the premises, and after satisfaction of the mortgage there remained a balance of £800, which was paid to the solicitors of the surviving trustees, in whom the premises, subject to the mortgage, were vested. The trustees claimed to retain the £800, or a considerable part thereof, by way of indemnity against any liability under the original lease.

On the 13th of February, 1888, at a special general meeting of the life members, shareholders, and annual subscribers, resolutions were passed, which were confirmed at a subsequent meeting held on the 8th of March, 1888, authorizing the board of directors to alter the old rules and make new ones. The new rules provided that the society should consist of donors of £20 and upwards, who should be life members, of £20, £10, £5, and £2 shareholders, and of subscribers. These were to have the right of voting for the managing directors. Then, after provisions relating to the different classes of subscribers, it was declared that the property of the society should be first vested in not less than eight trustees, who were to hold the property for the benefit of the society with the usual indemnities and powers. It was also provided that no shareholder should be liable beyond the amount of his shares, and that the trustees should have power to purchase, sell, or exchange any real or personal property, or raise money by way of mortgage for the benefit of the society, at the request of the board of directors. The officers of the society were to be under the management of a board of directors, consisting of a president, two vice-presidents, a treasurer, and eighteen directors. Then by rule 16 it was provided:

"The society shall not be dissolved unless a resolution be carried by a majority of at least two-thirds of the life members and shareholders present at a meeting especially convened for that purpose, and confirmed by at least as great a majority at a second special meeting held at an interval of not less than a month from the first. The property remaining after paying off all liabilities shall be divided among the shareholders *pro ratâ*."

Rule 18 (as required by the Act 6 & 7 Vict. c. 36): "This society shall not make any dividend, gift, division, or bonus in money unto or between any of its members."

The society was never incorporated or registered under any Act of Parliament, and no trust-deed was ever executed.

On the 22nd of August, 1888, a general meeting of the life members and shareholders was held, at which it was resolved that the society should be dissolved, and at another meeting held on the 1st of October this resolution was confirmed.

In November, 1888, the library books, furniture, fittings, and other effects of the society were sold, and the proceeds, amounting to £150, were paid to the treasurer of the society. The said sums of £800 and £150 represented the whole available assets, and the directors had thereout paid all the ascertainable debts and liabilities of the society. Advertisements for creditors and claimants had been issued, and the time limited by such advertisements had long since expired.

A petition for winding-up the society was now presented under the *Companies Acts*, 1862 and 1867, by shareholders and a life member, who stated in the petition that it was not known who the present shareholders were by reason of many of them having died or gone to reside away from *Bristol*, or having transferred their shares to persons who had not registered the transfers: that there remained a considerable surplus for distribution, but that, having regard to the difficulty in determining whether the shareholders of the society were entitled to the surplus, and if so, how it ought to be distributed, it was just and equitable that the society should be wound up by the Court.

Edward Ford, for the petition:—

This is a friendly petition to ascertain who are entitled to this fund. I cannot find a case of a similar society having been wound up. I ask your Lordship to wind up this society under the 199th section of the *Companies Act*, 1862, which applies to unregistered companies. It is true we were not a trading association, but an extended meaning might be given to the term "place of business" in that section. *Re Dutton* (1), the case

(1) 4 Ex. D. 54.

of the *Tunstall Athenæum*, a similar institution, was said by *Huddleston*, B., to come within the *Literary and Scientific Institutions Acts*, 1854, ss. 29 & 30; but we cannot be within that Act, because of the proviso in sect. 30, "that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company."

A. G. Ford, for the society.

KAY, J.:—

I think, on the whole, that this is not a society which comes within the description "an institution in the nature of a joint stock company." It is not a trading association at all. Sect. 199 of the *Companies Act*, 1862, provides that any partnership, association, or company, except railway companies, consisting of more than seven members, and not registered under that Act, thereinafter included under the term "unregistered," may be wound up. Now, of course, this society is not registered. But if it comes within any section it is not section 199, because the first sub-section of that section provides that an unregistered company shall, for the purpose "of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate;" therefore the "partnership, association or company" which may be wound up under sect. 199 must be one of those thereinafter included under the term "unregistered company," and an unregistered company under the section must be wound up at its place of business, and "business" must ordinarily be trading under the Act. But, in the first place, this does not seem to me to be a joint stock company, because it is constituted by rules which do not permit of any dividend, division, or bonus among its members. The funds which are provided by the rules are to be subscribed by life members, subscribers, and shareholders. The objects of the society are entirely within the 33rd section of the *Literary and Scientific Institutions Act*, 1854, to which I have been referred. Therefore, undoubtedly it is an institution within that Act of Parliament. Now that Act of

Parliament provides that when such an institution—speaking generally, a literary institution, to call it by that name for this purpose—is dissolved, which this has been by both classes of members, its property shall be given to some other institution, to be determined either by the members or by the County Court—some other like institution. No doubt these rules contain a provision that when the society is dissolved its property shall be divided, not among those who contributed, but among the shareholders only. That is distinctly contrary to the Act of Parliament. No rules can obviate or get rid of the effect of a public Act of Parliament. It seems to me, therefore, that this Act of Parliament applies and that this institution does not come within the exception in sect. 30, which excepts joint stock companies. This, for the reason I have given, seems to me not to be a joint stock company, and I think, therefore, that the proper view to take is that the shareholders cannot divide the property of the company, as to which, indeed, there seems to be a difficulty, because it has not been ascertained who they are and where they all are. The institution to which the property must be given must be determined by the Court. This, however, cannot be done until all the liabilities are discharged. It is suggested that there may be a liability under covenants in the leases to which the institution is subject. The Court will, of course, see that proper provision is made to indemnify the members. I am glad to come to this conclusion, because if I were to make a winding-up order a great part of the funds would be dissipated in costs, whereas now, by a simple application, the fund may be saved for the benefit of some other useful institution of the same class and character. I am of opinion that the institution comes within the first part of the 30th section of the *Literary and Scientific Institutions Act*, 1854, and is not affected by the proviso in that section. I therefore make no order except that the costs of the Petitioners and of the association are to be paid out of the assets of the institution.

Solicitors: *J. J. Harlow*, for *J. H. King, Bristol*; *Robinson, Preston, & Stow*, for *Jacques, Pease, & Jacques, Bristol.*

G. I. F. C.

WESTRUP *v.* GREAT YARMOUTH STEAM CARRYING COMPANY.

KAY, J.
1889
Dec. 2.

[1889 W. 784.]

Ship—Maritime Lien—Towage.

There is no maritime lien for ordinary towage services rendered to a ship.

ADJOURNED SUMMONS.

This action was brought by a holder of mortgage debenture bonds of the *Great Yarmouth Steam Carrying Company*, on behalf of himself and the other holders of like bonds, for the realization of their securities. A receiver was appointed in the action.

An order was made for the winding-up of the company, and the receiver was appointed official liquidator in the winding-up.

This was a summons by the owners of four steam-tugs, creditors of the company, for a declaration that the Applicants were entitled to lien for towage services upon the vessels of the company to which they had rendered such services, and for an order that they might be paid their claims in full, and the costs of the application, out of the proceeds of sale of the vessels of the company.

Upon the hearing of the summons it appeared that (with an insignificant exception) the services were in the nature of ordinary towage services rendered by the Applicants in towing the vessels of the company from time to time into and out of the harbour of *Great Yarmouth*, and the only question argued was whether or not such services were the subject of maritime lien so as to entitle the Applicants to prove for their claims in full as asked by the summons.

J. Gorell Barnes, Q.C., and *L. E. Pyke* for the Applicants:—

Towage services give rise to a maritime lien. In the case of *The Isabella* (1), decided by Sir *John Nicholl* in 1838, and therefore previously to the Act 3 & 4 Vict. c. 65, whereby an extended jurisdiction was conferred on the Court of Admiralty, that Court, in an action of salvage, exercised jurisdiction *in rem* over the vessel although the services rendered only amounted to towage, and at that time the Court had no power to enforce such a claim independently of maritime lien. That case, therefore, must be taken as recognising a maritime lien as arising out of towage services. Then in *The Constancia* (1), decided in 1846, claims for towage were allowed to rank along with wages and pilotage in priority to previous bottomry bonds; and in *The St. Lawrence* (2) the existence of a maritime lien for towage was admitted in argument. See also *Williams* and *Bruce's* Admiralty Practice (3). That is all the express authority on the subject. On the other hand, in the case of *The Heinrich Björn* (4), there are, no doubt, observations of Lord *Bramwell* in the House of Lords (5) and of the Court of Appeal (6) adverse to the existence of a maritime lien for towage services. But the question in that case was as to a claim for necessaries, and the observations are *dicta* not necessary to the decision. It is undisputed that a maritime lien has always existed for salvage, and towage is closely akin to salvage. The Court of Admiralty has often entertained claims for towage in actions of salvage: *The Isabella* (7); *The Princess Alice* (8). The object of the Act of 1840 was to extend the locality of the jurisdiction of the Court of Admiralty within the body of a county, and the Act dealt simply with jurisdiction and not with maritime lien, though it extended the area of the lien by extending that of the jurisdiction. Because there is no maritime lien for necessaries, it does not follow that there is none for towage, which is of recent origin: *The Wataga* (9).

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(1) 3 Hagg. Adm. 427.

[They referred also to *The General Palmer* (10) as to the existence of a lien for pilotage.]

Horton Smith, Q.C., and *D. L. Alexander*, for the official liquidator and receiver:—

There is no clear authority in favour of the existence of the

(1) 4 N. of C. 512; 10 Jur. 845.
(2) 5 P. D. 250.
(3) 2nd Ed. p. 175.
(4) 10 P. D. 44; 11 App. Cas. 270.
(5) 11 App. Cas. 283.
(6) 10 P. D. 53.
(7) 3 Hagg. Adm. 427.
(8) 3 W. Rob. 138.
(9) Swa. 165, 167.
(10) 2 Hagg. Adm. 176.

alleged lien, and principle is against it. There is a broad distinction between towage and salvage: *The Princess Alice* (1); towage being simply "the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress" (2). Therefore towage services arise out of contract, and, in general, out of a contract made on land. Previously to the Act of 1840 the Court of Admiralty had no jurisdiction in the case of a contract made on land or in the body of a county: *Greenway and Barker's Case* (3); *General Iron Screw Collier Company* v. *Schurmanns* (4); 13 Ric. 2, stat. 1, c. 5; 15 Ric. 2, c. 3; 4 Co. Inst. p. 134; 1 Com. Dig. (5). Where there is no jurisdiction there can be no maritime lien. Therefore there could have been no maritime lien for towage before the Act of 1840. *The Isabella* (6) is no authority to the contrary. It was a case of salvage, and the Trinity Masters looked into the matter and thought that the services were in the nature of towage, and a sum was awarded as for towage. If the case had not been launched as one of salvage the claim could not have been entertained: see *The Strathnaver* (7). It is now settled that the Act of 1840 did not create a maritime lien in a case where none existed before: *The Sara* (8); *The Alexander Larsen* (9); *The Ocean* (10). In neither of the cases of *The Constancia* (11) and *The St. Lawrence* (12) was the question of maritime lien for towage raised in argument, and in the case of *La Constancia* the towage may have been in the nature of salvage. Moreover, those cases were decided at a time when it was supposed that the Act of 1840 did create a maritime lien. It is clear that the Court of Admiralty can exercise jurisdiction *in rem* although there is no maritime lien: *The Two Ellens* (13); *The Sara.*

Pyke, in reply.

(1) 3 W. Rob. 138.
(2) Ibid. 139, 140.
(3) Godbolt, 260.
(4) 1 J. & H. 180, 193.
(5) 5th Ed. pp. 497, 504.
(6) 3 Hagg. Adm. 427.
(7) 1 App. Cas. 58, 65.
(8) 12 P. D. 158, 162.
(9) 1 W. Rob. 288.
(10) 2 W. Rob. 368; 9 Jur. 381.
(11) 4 N. of C. 512; 10 Jur. 845.
(12) 5 P. D. 250.
(13) Law Rep. 4 P. C. 161, 166.

KAY, J.:—

This is simply a question whether there is any authority for the proposition that there exists a maritime lien for services rendered to a ship, not in the nature of salvage, but in simply towing the ship. Of course if it were towing for the purpose of salvage of the ship nobody would hesitate to say that it must come within the principle applicable to salvage. But here it is admitted that there has been no service of that kind, but merely towage for the purpose of accelerating the speed of the ship, either leaving or returning to the port.

Now, the authority bearing upon the subject is as follows. In the case of *The Heinrich Björn* (1) Lord *Bramwell* discusses the meaning of sect. 6 of the statute 3 & 4 Vict. c. 65, which enacts "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for service rendered to, or damage received by, any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made." That case was one in which necessaries were supplied, and the argument seems to have been that because the Act I have just mentioned gave the High Court of Admiralty jurisdiction with respect to necessaries, therefore necessaries became the subject of maritime lien. Lord *Bramwell* in answering that argument, said this (2): "Jurisdiction is by the section given in cases of (towage), and it cannot be pretended that there was any maritime lien as to that when it occurs on the high seas. It was, indeed, said it was a sort of salvage, but it certainly is not. And the Admiralty Court, I take it, would have, under the statute, jurisdiction in a case of towage where the ship had been let and the owner was not liable." Then later on he said: "Jurisdiction as to towage was not created by the statute. It existed before, with no maritime lien." Now that case came first before Sir *James Hannen* (3), and went on appeal to the Court of Appeal, by whom his decision was reversed. The judgment in the Court of Appeal, constituted of Lord *Esher*, M.R., and Lords Justices *Bowen* and *Fry*, was delivered by Lord Justice *Fry*; but in the part which I am about to read it was the judgment of them all, because, as has been pointed out, the Lord Justice (1) begins by saying: "This judgment is that of the Master of the Rolls, Lord Justice *Bowen*, and myself; but I should state that in that portion of it which decides that the agreement, which I shall presently read, is not a bottomry bond, the Master of the Rolls concurs with difficulty. But he unhesitatingly agrees with the remainder of the judgment." Now these are the words used by the whole Court (2), still commenting on the same 6th section of 3 & 4 Vict. c. 65: "It has been suggested that the way in which necessaries are associated with salvage and damage implies an intention to give in respect of necessaries the same lien as existed in respect of salvage, but the argument is not satisfactory, especially when it is observed that necessaries are more closely associated with towage, which gave no lien, than with salvage or damage." Therefore I have the considered opinion of Lord *Esher* and Lords Justices *Bowen* and *Fry*, confirmed by Lord *Bramwell* in the House of Lords, that towage on the high seas does not give a maritime lien. Now it has been argued, and I agree with the argument, that this statement of the law is not altogether extra-judicial, because it was a link in the chain of reasoning on which the judgments were founded. The argument was this: "The statute does not give a maritime lien for necessaries, in respect of which there was admittedly no maritime lien before the statute. It is said that it does give such a lien, because the word 'necessaries' is coupled with the word 'salvage'; but it is also coupled with the word 'towage,' in respect of which there is likewise no maritime lien." I quite agree that it is a legitimate argument that this was an essential part of the *ratio decidendi*, and therefore these observations are rather more than extra-judicial dicta.

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(1) 11 App. Cas. 270.

(2) 11 App. Cas. 283.

(3) 8 P. D. 151.

Then what authority is there on the other side? No case has been cited in which the neat point has been argued and decided whether towage did give a maritime lien, either on the high seas

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(1) 10 P. D. 48.

(2) 10 P. D. 53.

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before the Act, or within the body of a county since the Act; but three cases have been cited in which towage has, no doubt, been treated as if it gave a maritime lien. They are *The Isabella* (1); *The Constancia* (2), and *The St. Lawrence* (3); but in not one of those cases was the point argued. Towage was treated as though there was a maritime lien in respect of it when coupled with other things, as to which in some of the cases there was undoubtedly a maritime lien. That may have been because it was not worth while to insist upon the distinction, or (except in the case of *The Isabella*) that the towage in question was towage in the nature of salvage. In the case of *The Isabella* it certainly was found that the towage was not in the nature of salvage. But there again I cannot find that there was any distinct argument or distinct decision on the point that towage differed from necessaries supplied to a ship in respect that it was the subject of a maritime lien. Accordingly, I am bound to say that the weight of authority is against this application, and that it must be refused, and with costs.

Solicitors: *Ingledew, Ince, & Colt,* agents for *Chamberlin & Leech, Great Yarmouth; H. Montagu.*

C. C. M. D.

KAY, J.
1889
Dec. 4.

In re FROST.
FROST *v.* FROST.

[1889 F. 1042.]

Will—Devise—Contingent Remainder—Perpetuity—Remoteness—Possibility upon a Possibility.

A testator, who died in 1870, by his will dated the same year, devised a freehold estate to the use of his sons and their heirs during the life of his daughter, *E.*, upon trusts for such daughter; and after her decease "to the use of any husband whom she may hereafter marry," during his life; and after the death of the survivor of his daughter and such husband, to the use of the children of his daughter as she should appoint, and in default of such appointment, to the use of all the children of his daughter who should be living at the death of the survivor of her and her husband, or should have previously died leaving issue then living, in equal shares; but in case no child of his daughter should be living at the death of such survivor, or should have previously died leaving issue then living, then to the use of such of his sons and of his other daughters as should be then living, or should have previously died leaving issue then living, in equal shares. The will contained a gift of residue.

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(1) 3 Hagg. Adm. 427.
(2) 4 N. of C. 512; 10 Jur. 845.
(3) 5 P. D. 250.

The daughter, *E.*, was a spinster at the testator's death, but subsequently, in 1872, married and died shortly afterwards without issue. Her husband died in 1888:—

Held, that the limitations subsequent to the life estate of the daughter's husband were void for remoteness, and that on his death the devised estate passed under the residuary gift.

Cole v. *Sewell* (1) considered.

ADJOURNED SUMMONS.

Thomas Frost, by his will dated the 19th of March, 1870, made the following devise:—

"I give to my sons, *John Frost*, *Edwin Frost*, and *Albert Frost*, all those my closes of land and hereditaments situate in the parish of *South Brent* aforesaid which are described in the 7th schedule of this my will, to hold the same unto and to the use of my said sons, *John Frost*, *Edwin Frost*, and *Albert Frost*, and their heirs, during the life of my daughter, *Emma Frost*, without impeachment of waste, upon trust, so long as she shall continue unmarried, to permit her to receive the rents and profits thereof to her own use, but in case she shall hereafter marry, then upon trust to receive the rents and profits thereof, and pay the same to my said daughter, *Emma Frost*, for her separate use, free from the debts, control, or engagements of any husband whom she may hereafter marry, and her receipt alone to be a good discharge for the same. And after the decease of my said daughter, *Emma Frost*, then to the use of any husband whom she may hereafter marry, and his assigns, during his life, without impeachment of waste; and from and after the decease of the survivor of them the said *Emma Frost* and of such husband, to the use of all and every or such one or more of the children of my said daughter, *Emma Frost*, for such estate or interest and subject to such charges, and in such manner, without prejudice to the executory devise over hereinafter contained, as my said daughter, *Emma Frost*, shall by deed or will, notwithstanding coverture, appoint;

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(1) 4 D. & War. 1; 2 H. L. C. 186.

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and in default of appointment, and so far as no such appointment shall extend, to the use of all and every the children or child of my said daughter, *Emma Frost*, who shall be living at the time of the death of the survivor of them the said *Emma Frost* and such husband of the said *Emma Frost*, or shall have previously died leaving issue then living, their, his or her heirs and assigns, if more than one in equal shares as tenants in common; but in case no child of the said *Emma Frost* shall be living at the death of the survivor of them, the said *Emma Frost* and such husband, or shall have previously died leaving issue then living, then to the use of such of my sons and of my other daughters as shall be then living, or shall have previously died leaving issue then living, their, his or her heirs and assigns, if more than one in equal shares as tenants in common."

And the testator gave to his said sons, *John Frost*, *Edwin Frost*, and *Albert Frost*, their heirs, executors, administrators and assigns, all his residuary real and personal estate and effects, upon trust to sell the same and divide the proceeds, after payment thereout of his debts, funeral and testamentary expenses, equally between his eight children, naming them, including the said *Emma Frost*.

The testator died on the 23rd of April, 1870, leaving all his eight children, including *Emma Frost*, surviving him. At her father's death, *Emma Frost* was a spinster, but in 1872 she married *Robert Tyley*. Shortly afterwards, in the same year, she died, but without issue.

Robert Tyley died on the 20th of October, 1888.

This summons was taken out to ascertain whether, according to the true construction of the will, the *South Brent* estate, upon the death of *Robert Tyley*, passed under the residuary gift; the question for argument being whether the limitations over after the death of *Robert Tyley* were or were not void for remoteness.

Badcock, for the Plaintiff, a person claiming under the residuary gift:—

The gift over after the death of *Robert Tyley* in default of appointment by Mrs. *Tyley* is void for remoteness; consequently the property, the subject of the gift, passes under the residuary devise. The case falls exactly within *In re Harvey* (1), where Lord Justice *Cotton* says (2): "The gift is to a class not to be ascertained till the death of the survivor of the daughter and her husband present or future," and the gift there was declared to be void. In this case the husband might not have been born at the testator's death. No doubt *Cole* v. *Sewell* (3) will be relied upon as establishing that the rule against perpetuity does not apply to legal remainders. But the decision in that case depends upon the fact that there was a previous estate tail the barring of which at any time would have destroyed the subsequent estate. There is no estate tail here. In *Cattlin* v. *Brown* (4), which was decided after *Cole* v. *Sewell, Page Wood,* V.-C., says, "I apprehend that a contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law." These limitations come precisely within the definition of a perpetuity quoted with approval by your Lordship from *Lewis* on Perpetuities in *London and South Western Railway Company* v. *Gomm* (5), as "A future limitation which will not . . . . necessarily vest within the period fixed and prescribed by law . . . . and which is not destructible by the persons for the time being entitled to the property subject to the future limitation." *Cole* v. *Sewell* has never been extended to a case in which there was no estate tail. If the present gift is an executory devise it is clearly void for remoteness.

Rowden, for Defendants in the same interest.

W. J. Lee, for Defendants claiming under the gift over:—

The limitation to the testator's sons and other daughters was a good alternative contingent remainder, being ready to vest on the death of *Robert Tyley.* In *Butler's* note to *Fearne's* Contingent Remainders (6) the law is stated to be that the remoteness of a remainder, however great, is no objection to it on its creation if the remainder will vest in possession immediately on the determination of the preceding estate. See also *Williams* on Real Property (1). In *Cole* v. *Sewell* (2) Sir *E. Sugden* says: "Where a limitation is to take effect as a remainder, remoteness is out of the question. . . . A remainder may be prevented from taking effect, but it can never lead to remoteness." The House of Lords affirmed that decision, and Lord *Brougham* expressly says that the law respecting perpetuities cannot apply to contingent remainders.

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(1) 39 Ch. D. 289.
(2) Ibid. 298.
(3) 4 D. & War. 1; 2 H. L. C. 186.
(4) 11 Hare, 372, 374.
(5) 20 Ch. D. 562, 575.
(6) 10th Ed. p. 565.

[KAY, J., referred to *In re Finch* (3).]

There the limitations were all equitable, and the decision in that case has never been extended to legal remainders.

[KAY, J.:—Is not the limitation here void as being a possibility upon a possibility? See *Whitby* v. *Mitchell* (4).]

That doctrine only forbids a limitation to an unborn person for life, with remainder to the issue of such unborn person; and this is what is meant by the rule against remoteness, as applicable to a contingent remainder, referred to in the authorities cited against me.

Badcock, in reply:—

Cole v. *Sewell* has never been extended to any case in which there was no previous estate tail. From the remark in *Sugden's* Law of Property (5) it seems that Lord *St. Leonards* was relying on the previous estate tail, and Lord *Cottenham's* judgment in the House of Lords was entirely based on the fact that the contingent remainder was always barrable. *Fearne* (6) expresses the view that contingent remainders which tend to a perpetuity are void.

[KAY, J., referred to *Mainwaring* v. *Baxter* (7) and *Beard* v. *Westcott* (8).]

[*Humberston* v. *Humberston* (9), and *Jarman's* Appendix on *Cole* v. *Sewell* (10), were also cited.]

(1) 13th Ed. pp. 271, 276.
(2) 4 D. & War. 28.
(3) 17 Ch. D. 211.
(4) 42 Ch. D. 494.
(5) Page 120.
(6) 10th Ed. p. 501.
(7) 5 Ves. 458.
(8) 5 Taunt. 393.
(9) 1 P. Wms. 332.
(10) Jarman on Wills, 4th Ed. vol. ii. p. 845.

KAY, J.:—

I believe it would not be at all advantageous to reserve my judgment in this case, because, as far as I know, the amount of authority is not very extensive, and I have no doubt that counsel have called my attention to the most important cases.

The limitation under this will is in this form:—[His Lordship read the first part of the limitations of the *South Brent* estate, and continued:—] Now the estate to trustees was specially limited to them and their heirs only during the life of *Emma Frost*; so that the limitation "to the use of any husband whom she may hereafter marry" is a legal limitation to such husband, and the limitations which follow are also legal limitations. [His Lordship read the limitations, and proceeded:—] The question is, whether the limitation in favour of the children of *Emma Frost*, with the gift over in default to other persons, is good. It is very clear that if it were a limitation of personal estate, or by way of executory devise, it would offend against the rule of perpetuity, because *Emma Frost* was unmarried at the date of this will. She might have married after the death of the testator a person who was not born in his lifetime, and it might therefore have been a limitation to *Emma Frost* for life, remainder to an unborn person for his life, with a contingent remainder over to the children of *Emma Frost* living at the death of that unborn person, or such of them as should be then dead leaving issue then living, and an alternative limitation to other persons, still to be living at the death of that unborn person, or leaving issue then living. That clearly would be a limitation which would offend against the rule of perpetuity, because it would tie up the estate, not merely during the life of *Emma Frost*, who was in existence at the death of the testator, but during the life of *Emma Frost's* husband, who might possibly not be living at the death of the testator. So that it would not merely be tied up for a life in being and twenty-one years after, but for a life in being, with remainder for a life not in being, with a contingent gift over. But it is said "this is not an executory devise, but simply a legal limitation by way of contingent remainder, and therefore the rule as to perpetuities does not apply to the case at all." Let it be so. No doubt contingent remainders were invented long before the rule of perpetuity, and they were not originally subject to any such rule. But they were subject, before this rule was invented, to another rule which was thus expressed in the old legal language, that you cannot limit a possibility upon a possibility; and the familiar illustration is that you cannot limit by way of legal devise or conveyance to *A.*, an existing person, for life, with remainder to his unborn son for life, with remainder to the children of that unborn son. That last remainder was void, because, according to the phrase used in the old law, it was "a possibility upon a possibility." Now I think, there is no question that this is the law to this day, although the reason for it has been contested by modern lawyers, and a learned argument on the point may be found in that very valuable book, the late Mr. *Williams's* Treatise on the Law of Real Property. I lately had to consider the point myself in *Whitby* v. *Mitchell* (1), and I decided that the rule exists to this day. I find in *Butler's* note to *Fearne* on Contingent Remainders (2) this statement. After dealing with the doctrine of perpetuities or excessive restraint upon alienation, he says: "No question of perpetuity could arise at the Common Law, or under the statute *De Donis.* It has been shewn, that after the statute *De Donis,* and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it, on its creation. If the event, upon which it was to vest, took place during the continuance of the preceding estate, or at the instant of its determination, the remainder would vest in possession immediately on the determination of the preceding estate; if the event did not take place during the continuance of the preceding estate, or at the instant of its determination, the remainder would wholly fail of effect: during this period, therefore, of our law, all inquiry respecting perpetuity was out of question. The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue."

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(1) 42 Ch. D. 494.

(2) 10th Ed. (1844) p. 565.

There the rule is confined, no doubt, to that person's issue. I read the note because it recognises that the rule exists, and has as much force in the present day as when it was originally invented. What was the reason of that rule? As expressed by the learned lawyers of that day it was on the ground of a possibility upon a possibility? What does that mean? It means that there might never be such a person as an unborn person who was to take for life. That was an obvious contingency. Besides there was another contingency. There might never be issue of that person. Therefore there was a double contingency or a double possibility. I quite agree that the contingency in this case is not of that kind precisely. But is it not the same in effect? There is the double possibility. There might not be an unborn husband—I mean a husband of *Emma Frost* unborn at the death of the testator. But if there were, the other contingency which is to take effect upon his death might never happen. There you have a double contingency, or a double possibility as the old lawyers would have said. I confess I think that this limitation would have been held to fall within the same doctrine, and would most probably have been held void, if the ingenuity of lawyers had ever imagined such a limitation.

But if it is not void upon that ground it is certainly void as a perpetuity if the rule against perpetuity applies to the case. I have to ask myself the question whether the rule against perpetuity applies to the case or not—whether it is void on the ground of perpetuity. Lord *St. Leonards* in *Cole* v. *Sewell* (1) used language which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder: and the same language, or something like it, is also used in what I have read from *Butler's* note. But in every one of these cases the language refers simply to the case of an estate for life or an estate tail limited to a person *in esse* when the limitation takes effect. If this is so it is quite clear that no contingent remainder to take effect upon the determination of that estate could be exposed to any objection on the ground of being too

(1) 4 D. & War. 28.

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1889
In re FROST.
FROST *v.* FROST.

remote. But none of that language contemplates the case of there being interposed a possible estate for life to a person not in existence, and a contingent remainder over on the death of that person. However, I do not at all agree that under the law of the present day there cannot be any application of the rule against perpetuities to remainders. I find in *Fearne* on Contingent Remainders, in the edition already referred to (1), this statement of the law: "Here indeed it may not be improper to remark, once for all, that any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation." Here, then, is a clear statement of the law in a book of great authority, that the rule against remoteness will be applied to contingent remainders as well as to contingent limitations by way of executory devise. I take the meaning to be this: There are limitations which would have been void under the old law, because they would have been treated as possibilities upon possibilities. The like limitations would now be void, but perhaps for a different reason, namely, because they offend against what in more modern law we call the rule against perpetuities. I think, therefore, on the whole, that the balance of authority is in favour of the view that this limitation, although a legal limitation, is void, because it offends against the rule of perpetuity. There will be a declaration accordingly and that the lands in question fall into the residuary gift.

Solicitors: *H. Q. Louch*, for *Louch & Son, Langport; Prideaux & Sons*, for *J. R. Poole & Son, Bridgwater.*

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(1) Page 502.

G. I. F. C.

In re DALE AND PLANT, LIMITED.

KAY, J.
1889
Dec. 19.

Company—Winding-up—Proof—Salary of Managing Director—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 38, *sub-s.* 7 [*Revised Ed. Statutes, vol. xiv. p.* 211]—*Debt due to Member of Company in his Character of a Member.*

Arrears of the salary due to a managing director of a company in which directors were obliged to be shareholders, and damages for breach of contract by the company to employ him as managing director at such salary:—

Held, not to be debts due to him in his character of a member within the meaning of sect. 38, sub-s. 7, of the *Companies Act*, 1862.

ADJOURNED SUMMONS.

This company was formed in October, 1886, for the purpose of acquiring and carrying on the business of drysalters, &c., formerly carried on by *James Dales* (known as *Dale*) and *Samuel Allen Plant* of *Birmingham;* and an agreement was entered into between *Dales* and *Plant* and the company whereby the business was sold to the company in consideration of cash and fully paid-up shares, and *Dales* and *Plant* were, for the term of ten years from the 31st of March, 1886, to remain as managing directors of the company, and each of them was to be remunerated at the rate of £300 per annum.

By the articles of association (art. 104) *Dales* and *Plant* were appointed the first managing directors upon the terms contained in the agreement: (art. 106) the qualification of every director was to be the holding in his own right of not less than ten shares: (art. 107) the directors were to be paid for their services out of the funds of the company the remuneration following, viz., *Dales* and *Plant* each £300 per annum, and each of the other directors such sum as the company in general meeting should from time to time determine: (art. 110) every director was to vacate his office if he ceased to be a holder of at least ten shares: (art. 119) *Dales* and *Plant* were to be styled managing directors, and to remain on the board so long as they continued in the employment of the company under the agreement or any extension thereof, and the determination of the agreement, or any extension thereof, was not to invalidate their appointment as directors.

An order was made for the winding-up of the company, and in the winding-up *Plant* claimed to rank as a creditor for (1) £274 18*s.* 10*d.* balance of purchase-money under the agreement, (2) £118 13*s.* 4*d.* arrears of salary as managing director, and (3) damages for breach of the agreement to employ him as managing director for ten years at a salary of £300 a year, and which damages the chief clerk had found to be £1500.

It was arranged that the entire claim should be admitted at the sum of £1650, subject to the question whether *Plant* was entitled to prove for the salary and damages in competition with the other creditors of the company, and the matter was adjourned into Court for the determination of this question.

By sect. 38, sub-sect. 7, of the *Companies Act*, 1862, no sum due to any member of the company, in his character of a member, by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company.

Chadwyck Healey, in support of the summons:—

Sect. 38, sub-sect. 7, of the *Companies Act*, 1862, does not apply to the present case, so as to prevent the claimant from proving for his salary as managing director in competition with the other creditors of the company. The only case directly bearing on the point is *Ex parte Cannon* (1), where it was held that a director's unpaid fees were debts due to him in his character of member, and to be postponed to outside creditors. That decision was based on *Dunston* v. *Imperial Gas Light and Coke Company* (2), which was a very peculiar case, and a ground of the decision was that the payments were in the nature of gratuities.

[KAY, J.:—Was not the sub-section intended to introduce a rule by analogy to the law of partnership, and could a managing partner claim salary as a creditor of the partnership?]

Perhaps he could not. But the sub-section could not have been intended to prevent a person who entered into an ordinary contract to do work for, or supply goods to, a company from proving in competition with other creditors, merely because

(1) 30 Ch. D. 629.

(2) 3 B. & Ad. 125.

he happened to have taken shares in the company. In this case the salary was remuneration for skilled work done for the company by the present claimant. The words of the sub-section "dividends, profits, or otherwise" evidently point to a claim by a shareholder for sums due in respect of his shares by way of dividend, bonus, or the like. It is true that in this case the managing director must necessarily be a shareholder, but he might have remuneration as a director which would fall within the sub-section, and at the same time, under a special contract, be entitled to special remuneration for extraordinary work, as to which he would be in the position of an ordinary creditor of the company.

Renshaw, Q.C., and *Levett*, for the Liquidator:—

This claim clearly falls within the principle of the decision in *Ex parte Cannon* (1). The claimant was entitled to this remuneration only because he was a director, and while he was a director. It is required by the constitution of the company that the managing director shall be a director and shareholder, and he is liable to vacate his office if he ceases to be a shareholder.

[Kay, J., put the cases of a solicitor of a company, being also a shareholder, claiming in respect of his bill of costs, and of a brickmaker who had supplied bricks to a company, and was also a shareholder, claiming in respect of the price.]

If the articles of association provided that any person employed as solicitor, or supplying bricks to the company must be a member, then the sub-section would apply. The case falls within the words "or otherwise." Those words do not qualify the word "member," but the words "sum due." If it is of the essence of the contract that there should be membership on the part of the person contracting with the company, money due to him under the contract is due to him in his character of member.

Kay, J. (without calling for a reply):—

I do not agree with the argument which has been addressed to me on behalf of the liquidator. This is a very simple point, and, to my mind, a very clear one. Here is a man appointed managing director. He was so appointed, as appears clearly enough, because he had special knowledge of the business which this company was going to carry on; and by the articles of association he was to receive certain remuneration for the management of the business of the company. Now it is quite true that a director was the only person who could be so appointed, and it is true also, or I assume it to be the fact, that no one could be a director who was not a shareholder. It is said that all remuneration agreed to be paid to the claimant for his special skill and attention in managing the business of the company is payable to him in his character of member. I do not agree with that contention. Let me try it by the same analogy which I put to counsel in the course of the argument. Suppose this case was that of a solicitor, a man specially trained in a peculiar business which is of great importance to the community, and that such solicitor happened to be a member of a company, and sent in his bill of costs for business done for the company. In the winding-up of the company could it be said that the solicitor should not prove in competition with the other creditors because he was a shareholder? Obviously that proposition could not be maintained for a moment. It was so admitted in the argument. But it is said that if the articles of association provided that no one should be a solicitor to the company unless he was also a shareholder, then the payment made to him would be a payment to him in his character of member. I do not follow that, and cannot agree with it. The payment to him in respect of his bill of costs cannot be payment to him in his character of member, whether the articles of association do or do not contain such a provision. The payment in either case is to him in his character of solicitor, and not in his character of member. Take another case. Suppose a company bought a million of bricks from a man who was a brick-maker. If he happened to be a shareholder, no one could doubt that that circumstance would not prevent him from proving in competition with the other creditors. But suppose that the articles of association contained provisions that no bricks should be bought of any person who was not a shareholder in the company. Is, then, the money paid as the price of the bricks money due to the vendor of them in his character of member? Certainly not. It is not money due to him in his character of member, but money due to him in his character of brick-maker or brick-seller, and the fact that one of the articles provided that the company should not buy of any one who was not a member would not make the price of the bricks money due to him in his character of member, any more than it would be if there were no such article.

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(1) 30 Ch. D. 629.

Then it is said, and this, to my mind, is the strongest part of the argument, that sect. 38, sub-sect. 7, of the *Companies Act*, 1862, is introduced into the Act of Parliament by analogy to the partnership law. A debt due to a partner could not be proved in competition with outside creditors where the partnership was dissolved. That is quite true. But the answer is that a shareholder is not a partner, and this section does not introduce all the partnership law with respect to every shareholder. It only introduces—I daresay it may be by analogy to the law of partnership—the particular provision which has now to be construed. That provision is this: "No sum due to any member of the company in his character of member"—I omit the intervening words—"shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company." What does "character of member" mean? The intervening words seem to me to shew that clearly. The words are:—"by way of dividends"—that is, on his shares—"profits"—that again is in respect of his shares—"or otherwise." The words "or otherwise" must mean something analogous to dividends or profits on his shares. That shews the meaning. Dividends are due to him in his character of member: profits are due to him in his character of member: there may be something else equally due to him in his character of member which this clause was intended to include. To my mind it is clear that the clause does not include money due for goods which a member has supplied to the company; otherwise it would be so expressed. Nor can it include payment for particular work which he has special skill in doing, and which he has done for the company. I am of opinion that this money which ought to have been paid to this claimant solely as managing director is money for which he may prove in competition with

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In re DALE AND PLANT, LIMITED.

other creditors. The only case cited is that of *Ex parte Cannon* (1), where a director claimed for fees, and the articles of association provided that "the remuneration of the directors for their services shall be such sum as the company in general meeting may from time to time determine, which shall be divided amongst the directors in such manner as they shall from time to time think fit." It was held in that case that the remuneration came within the words "money due to him in his character of member." I say nothing about that case except that it is not the case now before me, and it seems to me very plain that this is not money due to the claimant in his character of a member of this company, and that he is entitled to prove for it in the winding-up in competition with the other creditors.

Solicitors: *Belfrage & Co.*, agents for *Reece, Harris, & Harris, Birmingham*; *Ellis, Munday, & Co.*

C. C. M. D.

KAY, J.
1889
Dec. 6, 7.

In re HUISH.
BRADSHAW *v.* HUISH.

[1889 H. 2290.]

Will—Debt of Testator—Legacy to Creditor—Direction to pay Debts only—Satisfaction.

A direction by a testator that his "debts" are to be paid is sufficient, without the further direction to pay "legacies," to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt.

A lady gave a bond to her nephew, to whom she was not *in loco parentis*, to secure the payment of £1000, within twelve months after her death, to him, if he should be then living, or to his representatives if he should have died leaving issue him surviving, but not otherwise, with interest at £5 per cent. from her death. The bond was given on his marriage, and to the lady's knowledge was assigned by him to the trustees of his marriage settlement.

By her will she made various gifts to her nephew, including a legacy of

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(1) 30 Ch. D. 629.

£3000 to him absolutely. A codicil contained a direction that "all just and lawful debts" should be paid "at once":—

Held, that the bond was not satisfied by the legacy, but that both were payable.

Edmunds v. *Low* (1) disapproved.

ADJOURNED SUMMONS.

On the 15th of March, 1878, Mrs. *Margaret Huish*, widow, executed and handed over to her nephew, *Marcus Bourne Huish*, who was then about to be married, a bond in the sum of £2000, the condition of the bond being that it should be void, "If the executors or administrators of the said *Margaret Huish* shall within twelve calendar months next after her decease pay to the said *Marcus Bourne Huish*, if he shall be then living, or to his executors, administrators, or assigns, in case he, the said *Marcus Bourne Huish*, shall have died leaving issue him surviving, but not otherwise, the sum of £1000, together with interest for the same after the rate of £5 per cent. per annum from the day of the death of the said *Margaret Huish*."

This bond was immediately assigned by *M. B. Huish* to the trustees of his marriage settlement to be held by them upon the trusts thereof. *Margaret Huish* was not *in loco parentis* to her nephew, but it appeared from the evidence that she knew of his approaching marriage, and that the bond was to be and had been included in the settled property.

By her will, dated the 11th of January, 1887, *Margaret Huish*, after devising certain freehold property to her said nephew, *M. B. Huish*, bequeathed legacies to various persons, including a legacy of £3000 to her said nephew; and she also settled certain articles upon trusts for him and his issue as heirlooms. She also bequeathed certain pictures and other articles to her said nephew absolutely. After directing that all legacies should be paid free of legacy duty, the testatrix gave her residuary real and personal property to her sister and niece equally.

In a codicil, dated the same day, the testatrix said: "I wish all my funeral expenses and all just and lawful debts that I may owe to be paid at once."

Margaret Huish died on the 21st of March, 1889, leaving *M. B. Huish* surviving her.

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(1) 3 K. & J. 318.

This was an originating summons by the trustees and executors of the will to ascertain (amongst other questions) whether the legacy of £3000 was given in satisfaction of the whole or any part of the bond debt of £1000.

Cann, for the Plaintiffs, the trustees and executors.

Methold, for the Defendants, the residuary legatees:—

The debt is satisfied by the legacy. In *Wathen* v. *Smith* (1) a covenant in a marriage settlement by the husband to pay £1000 to the wife six months after his death was held to be satisfied by a gift in his will of £1000, payable three months after death, although the will directed payment of debts and legacies. It is true that this decision was doubted by *Romilly*, M.R., in *Cole* v. *Willard* (2). But in *Montagu* v. *Earl of Sandwich* (3), where there was a settlement by covenant of £1000 a year in favour of a second son, which the Court of Appeal construed to create a charge on all the testator's real estate, the words "subject to the charges and incumbrances thereon" in a devise of real estate to the eldest son, was held too vague to rebut the presumption of satisfaction of the covenant by legacies to the second son considerably exceeding £1000 a year in value. In the present case, too, the bond was only a voluntary debt.

[KAY, J., referred to *Edmunds* v. *Low* (4).]

In *Edmunds* v. *Low* the direction to pay debts alone was held not to be sufficient.

Renshaw, Q.C., and *Grosvenor Woods*, for the Defendant *M. B. Huish*:—

There is no satisfaction, because this legacy is only one out of several benefits, including gifts of real estate, conferred on *M. B. Huish* by the will, and he was not residuary legatee. The bond was settled, as the testatrix knew, and was vested in the trustees, whereas the legacy is direct to *Huish*. The bond carried interest from the death, the legacy did not. In *Atkinson* v. *Littlewood* (5)

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(1) 4 Madd. 325.

(2) 25 Beav. 568.

(3) 32 Ch. D. 525.

(4) 3 K. & J. 318.

(5) Law Rep. 18 Eq. 595, 605.

Malins, V.C., expressed his dissent from *Wathen* v. *Smith* (1). *Lord Chichester* v. *Coventry* (2) was a case where debts and legacies were directed to be paid, but Lord *Romilly* decided that there was no satisfaction, on the ground of the direction to pay debts only. See also *White & Tudor's* Equity Cases (3); *Rowe* v. *Rowe* (4); *Hales* v. *Darell* (5); *Pinchin* v. *Simms* (6); *Charlton* v. *West* (7). In *Dawson* v. *Dawson* (8) *Page Wood*, V.C., points out that in *Lord Chichester* v. *Coventry* the House of Lords relied on the direction to pay debts, without regard to the legacies. A like remark is also made by *Malins*, V.C., in *Atkinson* v. *Littlewood* (9). See also *Paget* v. *Grenfell* (10); *Carr* v. *Eastabrooke* (11).

Marten, Q.C., and *Butcher*, for other parties not interested in the present question.

Methold, in reply.

KAY, J.:—

I confess I think it is most expedient to abide by broad general rules in cases of this kind. If fine distinctions are to be made in each case the law is left in a state of great embarrassment and doubt. Here is the case of a lady who, in her lifetime, gave a bond to *Marcus Bourne Huish*, which was made payable to him on an event which has happened, and on her death, which has also happened. After she had given the bond, she made a will by which she gave him different benefits—real estate, chattels, a specific legacy, and a legacy of £3000. She said nothing about the bond in her will. The bond was actually given to Mr. *Huish* on the occasion of his marriage, and was intended by him to be subject to the settlement then made, and was in fact included in it, as it appears she knew. She made a codicil to her will, in which she said

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(1) 4 Madd. 325.
(2) Law Rep. 2 H. L. 71.
(3) 6th Ed., vol. ii., p. 408.
(4) 2 De G. & Sm. 294.
(5) 3 Beav. 324.
(6) 30 Beav. 119.
(7) Ibid. 124.
(8) Law Rep. 4 Eq. 504, 510.
(9) Ibid. 18 Eq. 603.
(10) Ibid. 6 Eq. 7.
(11) 3 Ves. 561.

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that she wished her debts to be paid at once after her death. It was argued rightly that this is a direction to pay debts at once, and it singularly affects this particular debt, because by the terms of the bond the debt was to be payable within twelve calendar months after her death, and she may have had this very bond in her mind, and wished that it should be paid at once. However that may be, there is in the codicil that which was not strictly necessary, namely a direction for the payment of debts. Now it has long been settled that, in the case of a debt owing by a testator, if the testator afterwards makes a will and gives a legacy of the same or a greater amount to the creditor, and then in his will directs that his debts and legacies shall be paid, that direction rebuts the presumption of satisfaction of the debt by the legacy. Now, what difference is there between a direction to pay debts and legacies and a direction to pay debts only? There is none, because the gift of a legacy is in itself a direction that the legacy shall be paid. Therefore all that is material is, that there should be a direction that debts should be paid. If, after giving a legacy to his creditor, a testator says, "I direct my debts to be paid," that means: "Although I have given a legacy to my creditor, I direct that my debt to him be paid also." It seems to me to make no difference where the testator directs that his legacies, as well as his debts, shall be paid. Accordingly I think that the case of *Edmunds* v. *Low* (1), which appears to have drawn a distinction between a direction to pay debts and legacies and a direction to pay debts only, was not sufficiently considered; and I find that the balance of authority is against it. Indeed the same learned Judge who decided that case, in a later decision of *Dawson* v. *Dawson* (2), after referring to several other decisions, seems to have come to the conclusion that a direction to pay debts only was sufficient to rebut the presumption of satisfaction. I think, therefore, on the whole, it is better to abide by that as a broad rule, which is very easy to understand, and which can be followed as a guide in cases of this kind. It is not necessary in a will to give any direction to pay debts at all. If such a direction is inserted it may be assumed to be there for some purpose. It is very likely, if the testatrix knew anything about the law, as I am bound to presume that she did, that she desired in this way to prevent the suggestion of the satisfaction of the debt which she owed by the legacy. I therefore hold that there is no satisfaction, and that the debt and legacy must both be paid.

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(1) 3 K. & J. 318.

(2) Law Rep. 4 Eq. 504.

Solicitors: *F. Needham*, for *T. Hamilton Urry, Ventnor*; *Rowcliffes, Rawle, & Co.*, for *Holland & Rigby, Ashbourne*; *W. E. Tyer*.

G. I. F. C.

MACKENZIE *v.* CHILDERS.

[1888 M. 2879.]

KAY, J.
1889
Dec. 10, 11, 12, 19.

Restrictive Covenant—Building Scheme on Sale of Estate—Obligation of Vendor—Sale by Trustees—Recital in Deed—Implied Covenant—Injunction against authorizing Departure from Scheme.

A restrictive covenant or contract not being a limitation of property is not obnoxious to the rule against perpetuities.

London and South Western Railway Company v. *Gomm* (1) explained.

A building estate was offered for sale by auction by the trustees of a will in plots, according to a plan and particulars and conditions of sale referring to a deed of mutual covenants, which was to be executed by the vendors and each of the purchasers. The deed contained a recital that it was intended to be a part of all future contracts for sale of the plots that the several purchasers should execute the deed, and be bound by the stipulations contained in it; and thereby it was expressed that each purchaser covenanted with the vendors and with the other purchasers to conform to certain stipulations restrictive of the mode of building on the plots, but there was no express covenant to the like effect by the vendors. Some of the plots were sold, and the several purchasers executed the deed, as did also the vendors. For twenty years subsequently the stipulations were observed, and as plots were from time to time sold the respective purchasers executed the deed. At the expiration of that period the existing trustees of the will put up a portion of the estate for sale in different plots, and under conditions authorizing a mode of building which was not in conformity with the stipulations contained in the deed. Purchasers who had executed the deed brought an action for an injunction to restrain the trustees from selling except upon the terms of the deed:—

Held, that the recital in the deed was not a mere expression of intention which the vendors were at liberty to change, but the effect of the deed

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(1) 20 Ch. D. 562.

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was that the vendors thereby entered into a covenant not to authorize the use of the unsold plots in a manner inconsistent with the conditions of the building scheme as therein expressed; that even if the deed had not the effect of a covenant by the vendors, yet the trustees were bound by a contract, implied from the whole transaction, restricting their dealing with the land in violation of the building scheme; and that an injunction ought to be granted restraining them from authorizing any purchaser to build contrary to the building scheme.

IN 1867 the Defendant *Hugh Culling Eardley Childers* and *Godfrey Lushington*, the then trustees of the will of Sir *Culling Eardley*, with the assistance of *Habershon*, an architect, and *Strickland*, a builder, as stated by *Habershon*, in an affidavit made by him, "adopted" a scheme, which the builder and he had "elaborated," for the laying out portions of the trust property, called the *Belvedere* estate, for the purposes of building.

The scheme so elaborated, as *Habershon* deposed, was for the first time "delineated and shewn in its entirety" on the plan annexed to certain particulars and conditions of sale prepared for the purpose of a proposed sale by auction of the land shewn on such plan. The plan was a large one shewing the estate laid out in building plots. The land intended to be sold was coloured green, and the plots were marked out with lines, and numbered, and the sites of the houses intended to be erected, one upon each plot, were clearly shewn.

The particulars stated that the property had been laid out with the greatest care; that no purchaser was to erect more than one single, or two semi-detached, villas on his or their lots, nor of a less value than £500 for single ones, and £750 for a pair, with certain specified exceptions. No public-house was to be erected or opened on any part of the estate, and there were many other regulations calculated to insure that the property should only be used for villa residences of a certain class.

The 12th condition of sale was as follows: "All the lots are sold subject to the general stipulations in the particulars, and to certain covenants for regulating the building upon, fencing, and mode of using the land, the repair of roads, construction of cesspools, and for avoiding nuisances, contained in a deed-poll of mutual covenants, which has been, or is intended to be, executed by the vendors, and shall be executed by each of the purchasers.

No objection or requisition shall be made to or in respect of such deed or anything therein contained. Copies of the said deed-poll (without the plan and signatures and attestations) having been printed, it shall not be included in the abstract, but one of such copies shall be delivered to each purchaser, and in the meantime a copy thereof may be inspected on application to the auctioneer, the solicitors, or at the estate office, *Belvedere*."

"A short memorandum or notice of such deed having been executed by the purchaser shall be indorsed on the conveyance to each purchaser, and shall be signed by him or her at the time of the completion of his or her purchase."

The deed-poll so referred to had upon it a plan which was practically identical with the plan on the particulars of sale. The deed recited that the vendors had laid out the property for building purposes, and divided it into building plots, and formed roads, which plots and roads were delineated in plans thereto annexed, and coloured green and brown, and it contained these further recitals: "And whereas the said vendors propose to sell the said building plots or parcels of land, and have already sold some of them, and it is intended that the respective purchasers shall set and subscribe their respective names and seals to this deed, and that the distinctive numbers of the building plots or parcels of land so purchased by such persons respectively, as numbered on the said plan, shall be set opposite the respective signatures and seals to this deed of such purchasers respectively after the said several plots or parcels so purchased by them respectively have or shall have been conveyed to them respectively in fee. And whereas it was a part of the various contracts, and it is intended to be a part of all future contracts, for sale of the said plots or parcels of land respectively, that the several purchasers respectively should execute this deed, and should thereby be severally and respectively bound by all the stipulations hereinafter contained." The deed then witnessed that "in consideration of the premises" each purchaser for himself, his heirs, executors, administrators, and assigns, as to his particular plot, covenanted and granted with and to each of the other purchasers, his heirs and assigns, and with and to the several other persons, including the vendors, who at the time of his executing should be entitled to any part of the land coloured green on the plan, their respective heirs and assigns, amongst various stipulations for carrying out the building scheme, not to build any house or other building, except appurtenant offices, the cost of which should not amount to the sum mentioned in the succeeding conditions, nor to do anything in breach or violation of or contrary to the fair meaning of such conditions. The 6th of these conditions was that, with certain exceptions, not material to be noticed, no more than one single or two semi-detached houses should be erected on any one plot.

The sale took place on the 3rd of June, 1867. Only a few of the lots were sold at this sale. The "deed-poll," which was dated the 13th of February, 1868, was subsequently executed by the purchasers and by the vendors. It was admitted in argument that the deed, though called a deed-poll, must be treated as a deed *inter partes*.

Other plots of land were from time to time sold, and the several purchasers executed the deed; thus the deed was executed by the vendors and by fifteen purchasers in 1868, by four purchasers in 1869, two in 1870, one in 1871, one in 1872, two in 1873, one in 1874, three in 1875, two in 1876, two in 1877, two in 1878, one in 1879, one in 1880, three in 1882, three in 1883, one in 1886, seven in 1888, and fifteen in 1889; in all sixty-six different purchasers of different portions of the estate. Many of the purchasers spent very large sums of money in building upon their land upon the faith of this building scheme; and the same was always observed and acted upon down to the month of September, 1889, that is, for more than twenty years since the date of the deed-poll.

The Defendant *Edward Harbord Lushington* was in 1874 appointed a trustee of the will in the place of *Godfrey Lushington*, and on the 4th of September, 1889, the Defendants *H. C. E. Childers* and *E. H. Lushington*, as existing trustees, and their architect, finding that part of the land included in the building scheme, and coloured green on the plan, could not easily be disposed of on the terms of that scheme, but that it might be sold, if differently lotted, for the building of cottages for artizans employed in factories in the neighbourhood of the estate, put up this part of the land for sale by auction in plots different from those shewn on the plan above mentioned, and under conditions allowing the erection of more than one of such cottage dwellings upon plots shewn in the original building plan. It was not disputed that this mode of building was not in conformity with the stipulations contained in the deed. Notice of the building scheme was given at this sale, and the contracts then made were in a form which enabled the vendors to rescind them in the event of objection being raised by previous purchasers.

The Plaintiffs, who were purchasers of plots under the original building scheme, and had built at considerable expense upon their respective plots upon the faith of it, brought this action to restrain the Defendants, *H. C. E. Childers* and *E. H. Lushington*, from selling or disposing of any of the plots forming part of the estate, except upon the terms of the deed of the 13th of February, 1868.

After the commencement of the action the Defendant *Hugh Robert Eardley Childers* was appointed trustee of the will in the place of the Defendant *H. C. E. Childers*, and was made a party to the action by amendment. Some correspondence passed between the parties, in which the Plaintiffs required to be furnished with the names of the recent purchasers, that they might add them, if necessary, as defendants to the action. The answer of the Defendants was in substance that it was not necessary to supply the names then, as the trustees were only desirous to have their rights determined. His Lordship intimated that if any objection were taken on the ground that none of such purchasers was a party, he should, after that correspondence, think it his duty to allow the case to stand over in order to add the purchasers, or some of them, as parties, but the Defendants agreed that the case should be treated for the purpose of this action as though the purchasers, or some of them, were defendants to the action.

Millar, Q.C., and *Kenyon Parker* (Sir *Horace Davey*, Q.C., with them), for the Plaintiffs:—

This is the case of a general building scheme, in which the inducement held out to purchasers is to be gathered not by inference from correspondence, nor, as in *Renals* v. *Cowlishaw* (1), from the circumstances of the case, but from an express recital that it was intended to be a part of all contracts for sale of the estate that the purchasers should enter into covenants similar to those entered into by the Plaintiffs. It is submitted that upon the true construction of the "deed-poll" there was an implied covenant on the part of the vendors; but it is not necessary to rely upon that; it is a sufficient ground of equity that there was, on the very face of the deed, a representation as to the covenants to be entered into by future purchasers, which operated as the inducement to the Plaintiffs to become purchasers and to pay enhanced prices for the land. The decision of the House of Lords in *Spicer* v. *Martin* (2) is a clear authority in favour of the Plaintiffs, and was based on the ground—to use the language of Lord *Macnaghten*—that the public were "invited to come in and take a portion of an estate which was bound by one general law" calculated to increase the price of the houses. It is true that in that case *Spicer*, the vendor, was himself bound by a covenant, but the decision did not turn upon that. The principle which enables one purchaser under a building scheme to obtain an injunction against another must apply *à fortiori* as against the vendor from whom the one purchaser derives his right against the other. If the purchasers are bound by notice of the representation made by the vendor, *à fortiori* must the vendor himself be bound. Representation is therefore sufficient for the Plaintiffs' case, but if a covenant can be established the case is so much the stronger: *Whatman* v. *Gibson* (3); *Keates* v. *Lyon* (4). [They referred also to *Duke of Bedford* v. *Trustees of the British Museum* (5) and *Sayers* v. *Collyer* (6).]

Renshaw, Q.C., and *Onslow*, for the Defendants:—

There is nothing in the deed or the nature of the transaction which can bind the Defendants as to the mode of dealing with this estate. The recital in the "deed-poll" was a mere representation of intention not amounting to contract: *Jorden* v.

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(1) 9 Ch. D. 125.
(2) 14 App. Cas. 12.
(3) 9 Sim. 196.
(4) Law Rep. 4 Ch. 218, 223.
(5) 2 My. & K. 552.
(6) 28 Ch. D. 103.

Money (1); *Maddison* v. *Alderson* (2). The object of the building scheme was to enable the vendors to make the best of the estate: *Master* v. *Hansard* (3); and there was no intention on their part to be bound by any obligations in reference to it. The Plaintiffs' case must fail unless they can establish contract by the vendors: *German* v. *Chapman* (4); or that the vendors were in the position of trustees for them: *Child* v. *Douglas* (5). It is clear that no covenant by the vendors can be implied; where there is an elaborately framed deed such as this, carefully worded, and containing no express covenant, the Court will not imply one: *In re Railway and Electric Appliances Company* (6); *Aspdin* v. *Austin* (7). In order to succeed against the present trustees, the Plaintiffs must shew a covenant binding the land: in the present case such covenant, if shewn, would be void on the ground of a perpetuity: *McLean* v. *McKay* (8); *London and South Western Railway Company* v. *Gomm* (9). In all the decided cases the rights of the purchaser have arisen from the fact that the other purchasers have entered into covenants; there has been no case in which the vendor has been bound in the absence of covenant or contract. *Nottingham Patent Brick and Tile Company* v. *Butler* (10) shews clearly that the question is one which arises as between purchasers. In *Spicer* v. *Martin* (11) there was an overriding covenant entered into by the vendor, whence the "general law" spoken of by Lord *Macnaghten* was derived, and which accounts for the form of the injunction granted in that case. That case can be no authority where, as here, the vendors have not entered into any covenant.

Neither of the existing trustees executed the deed-poll. They cannot therefore be personally bound. In order to bind them it must be made out that the recital constituted a contract binding the trust estate and the land. The vendors, as trustees, could have no power to enter into such a contract. The Court will not impute to trustees dealing with the trust estate an intention to bind themselves and the estate by a covenant restrictive of the right to build upon the land.

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(1) 5 H. L. C. 185.
(2) 8 App. Cas. 467, 473.
(3) 4 Ch. D. 718, 722.
(4) 7 Ch. D. 271, 276.
(5) Kay, 560, 568; 5 D. M. & G. 739.
(6) 38 Ch. D. 597.
(7) 5 Q. B. 671, 683.
(8) Law Rep. 5 P. C. 327.
(9) 20 Ch. D. 562.
(10) 15 Q. B. D. 261; 16 Q. B. D. 778.
(11) 14 App. Cas. 12.

[They referred also to *Tulk* v. *Moxhay* (1); *Piggott* v. *Stratton* (2); *Western* v. *Macdermott* (3); *Harrison* v. *Good* (4); *Gaskin* v. *Balls* (5); *Nicoll* v. *Fenning* (6); *Haywood* v. *Brunswick Permanent Benefit Building Society* (7); *Austerberry* v. *Corporation of Oldham* (8); and *Collins* v. *Castle* (9).]

Millar, in reply:—

If the sale to the Plaintiffs was a breach of trust, so also was the sale by the trustees in September last; but in truth the adoption of the building scheme, so far from being a breach of trust, was clearly for the benefit of the trust estate. The decision in the *London and South Western Railway Company* v. *Gomm* (10) went upon the ground that the covenant in that case was in effect a limitation, and, so far as it operated as a limitation, it was held void for remoteness. There is no authority to shew that a covenant or contract restrictive of building is obnoxious to the rule against perpetuity. Upon the main question the authorities are clear. Purchasers have been restrained by injunction at the suit of other purchasers on the ground of knowledge and notice of a general building scheme, with a general building plan, and that all the purchasers have entered into a contract for the common benefit. The principle is based on knowledge and notice. *Spicer* v. *Martin* (11) is the last and most comprehensive authority, and it is completely in point. The decision was not rested on antecedent title between *Spicer* and the Commissioners from whom he bought, but solely and entirely on the existence of one general building scheme under which the lessees of *Spicer* were invited to purchase their leases. The recital in the deed-poll proclaimed the "general law" within the meaning of *Spicer* v. *Martin*, and it was intended so to do. It is absurd to say that the recital was merely intended to describe the mental condition of the trustees. It was at the very least a representation of an intended state of things on the faith of which the vendors obtained the money of each purchaser, and from which they cannot be permitted to recede at their pleasure or caprice: *Piggott* v. *Stratton* (1).

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(1) 2 Ph. 774.
(2) Joh. 341; 1 D. F. & J. 33.
(3) Law Rep. 2 Ch. 72.
(4) Ibid. 11 Eq. 338.
(5) 13 Ch. D. 324.
(6) 19 Ch. D. 258.
(7) 8 Q. B. D. 403.
(8) 29 Ch. D. 750.
(9) 36 Ch. D. 243.
(10) 20 Ch. D. 562.
(11) 14 App. Cas. 12.

1889. Dec. 19. KAY, J.:—

The question in this case is simply whether the vendors of land laid out upon a building scheme have covenanted or agreed, ✓expressly or by implication, with the Plaintiffs, who are purchasers of part of the land under that scheme, not to authorize other purchasers to use the rest of the land in violation of the building scheme. If they have so contracted, either by negative words, or by affirmative words which imply a negative, there is no doubt the Court would restrain them from breaking such contract. The facts are these:—[His Lordship stated the facts of the case, and continued:—]

Now the first question is, what is the true intent and meaning of this deed? A building scheme had been carefully elaborated. It had been embodied in an estate plan, to which all purchasers were referred by this deed. The deed recites that some purchasers had already bought lots according to this scheme, in respect of which they were bound to execute the deed. That was so. They had bought under the conditions to which I have referred, which expressly mention the deed, and this deed, executed under these circumstances by the vendors, states that "it is intended" not only that the actual purchasers should execute, but that it should "be a part of all future contracts for sale of the said plots or parcels of land respectively that the several purchasers should execute this deed, and should thereby be severally and respectively bound by all the stipulations hereinafter contained."

Counsel for the trustees have argued that this only means that such was the intention of the trustees for the moment, but that they might alter it at pleasure. They did not enter into any covenants, it is said, because they did not wish to bind themselves

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(1) Joh. 341; 1 D. F. & J. 33.

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in any way, and the phrase "it is intended" was adopted, no doubt, to induce persons to buy on the faith of the building scheme—that could not be denied—but to leave the trustees free to depart from it if they chose, at any rate as to land not actually sold.

That, it is urged, is the meaning, according to what is sometimes called "the good faith and honour," of this deed of contract.

Now I will apply to that argument a very simple test. Suppose in a building scheme like this a purchaser of one or more lots was required to covenant that he would not build more than one house on each lot, and that—there being no such deed as this—he inquired by letter of the vendors whether all past and future purchasers would be bound by like covenants, and that the vendors answered in writing, "It is intended that all past and future purchasers shall be bound by a like covenant." Would that be a mere expression of intention, which the vendor might alter at any time, or would it be a binding contract not to use or authorize the use of the remaining land otherwise? I should think that no lawyer or man of business would hesitate for a moment to say that would be a binding contract. The question is not what the vendor might mean—not whether in his own mind he intended to reserve a power of departing from the bargain, but what the purchaser would understand by the words—what effect they were intended or calculated to produce upon him.

If that would be the meaning of these words in such a letter, can they have any less or other meaning in such a deed as this? These recitals were inserted in the deed as one of the main inducements to purchasers to buy. It was obviously supposed that better prices could be obtained for the lots if each purchaser was assured that every other would be bound by like stipulations, and that the building scheme under which he was buying would be honourably carried out in respect of all the land coloured green on the plan.

Another mode of testing the argument is this. If this was merely a statement of intention which the vendors were not bound to abide by, they might change it at any time. If they sold half the estate at once to one or many purchasers, who bought and built houses on the faith of this statement, they might then immediately break up the building scheme, and sell the rest for a manufactory, for artisans' cottages, or for any purpose, however inconsistent with a scheme for a residential property. Nay, more, if it was merely intention, which they might alter, they might change it as to any of the lots they had actually sold, and absolve any one or more purchasers from the necessity of covenanting at all.

The lapse of time before their change of intention is not in the least in their favour. For twenty years they have acted as though the expressed intention was binding upon them. If the deed be ambiguous that conduct shews what they themselves understood it to mean.

I am clearly of opinion that the recitals in this deed do not mean that the intention was one which the trustees were at liberty to change, but that the meaning is that the land coloured green, whether sold or unsold, should not be used in a manner contrary to the building scheme, or, to take the very point now in controversy, that none of the lots marked on the building plan should have more than one house built upon it.

Then, if that is the meaning of this deed, what is its effect? It is a deed *inter partes*, the several parties being the vendors and the purchasers who execute. No formal words are necessary to make a covenant in such a deed. A statement of a binding intention on the part of the vendors who execute the deed, made, on the face of it, for the purpose of inducing the several purchasers to buy, is as good a covenant as could be made by the most formal words.

In my opinion the effect of this deed is that the vendors thereby enter into a covenant not to authorize the use of the unsold land coloured green on the plan in a manner inconsistent with the conditions of the building scheme as therein expressed, and in particular—with respect to the present dispute—not to authorize the building of more than one house upon each plot of the land coloured green on the estate plan annexed to the deed.

But if the deed did not bind them by such a covenant, what would be the effect of the whole transaction? A more perfect example of a building scheme, on the faith of which persons have been induced to buy land and to expend money in building, there could hardly be.

In the leading case of *Duke of Bedford* v. *Trustees of the British Museum* (1), the covenant sought to be enforced specifically in equity against the defendants had been entered into in 1675 by their predecessor in title to build a mansion and offices, and no other buildings, on the land where the *British Museum* now stands, and the Duke was held not entitled to equitable relief by injunction to prevent the defendants from building contrary to this covenant, because of the use which had in the meantime been made of the adjoining land, which, at the date of the covenant, was occupied by another mansion or unbuilt on. Sir *T. Plumer* said (2): "By the letter of the contract, the Duke is under no positive engagement to leave the northern boundary open; but the question is, whether, according to good faith and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state."

Since that decision many cases have occurred in which, especially where land has been purchased on the faith of a building scheme, an agreement has been implied between the several purchasers, or between them and the vendor, not to depart from the scheme.

In *Renals* v. *Cowlishaw* (3) there was a statement of the general doctrine by the late Vice-Chancellor *Hall*, which was approved by Lord Justice *James* on appeal (4), and more recently by the Lords of Appeal in *Spicer* v. *Martin* (5). That statement in effect is that every purchaser of a plot of land under a building scheme is entitled to the benefit of a covenant with the vendor by another purchaser "where the Court is satisfied that it was the intention" that he should be bound by the like covenant and should have such benefit. "This right" says the Vice-Chancellor, "exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase."

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(1) 2 My. & K. 552.

(2) Ibid. 572.

(3) 9 Ch. D. 125, 129.

(4) 11 Ch. D. 866.

(5) 14 App. Cas. 23.

To apply that language I should in this case, if there were no express covenant, "collect from the transaction of sale and purchase" an implied agreement by the vendors with every purchaser that none of the unsold lots should be built upon in a manner inconsistent with the building scheme, or at least that they would not authorize such a departure from the scheme.

In *Spicer* v. *Martin* (1), *Spicer*, by separate conveyances, had acquired the fee simple in seven houses in *Cromwell Gardens, South Kensington*. Each conveyance contained a covenant by him restricting his use of each house for anything but a private dwelling-house. He let one of these houses to *Martin*. He did not enter into any express covenant with *Martin* restricting the use of the other houses. But the lease to *Martin* had upon it a plan shewing all the seven houses, and *Martin* was informed before taking his lease that the leases of *Spicer's* other houses contained this restrictive covenant, and that there was a like covenant by *Spicer* in the conveyances to him. *Martin* thereupon in his lease entered into a like covenant as to the house he hired. Afterwards *Spicer* and his vendors arranged to authorize one *Brett* to convert five of the other six houses into an hotel: three of these houses being bought directly from *Spicer* for this purpose. The Lords Justices (2) restrained *Spicer* from "authorizing" this to be done. On appeal to the House of Lords this decision was affirmed. The House of Lords disclaimed proceeding upon the doctrine of *Piggott* v. *Stratton* (3), viz. that there had been a representation to *Martin* that *Spicer* was bound by a restrictive covenant as to the use of the houses from which he could not depart. Lord *Macnaghten*, in a speech which had been read and was approved by Lord *FitzGerald* and Lord *Watson* (4), says this, "As regards the Appellant," that is, *Spicer*,

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(1) 14 App. Cas. 12.

(2) 34 Ch. D. 1.

(3) 1 D. F. & J. 33.

(4) 14 App. Cas. 25.

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"the case, I think, is doubly clear. It seems to me that when Mr. *Spicer* put his houses in *Cromwell Gardens* on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. *Spicer* got. Can he or his representatives be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?"

That is, *Spicer* was bound to *Martin* by an implied contract—implied from the whole transaction—not to authorize a departure from the rule restricting the use of those seven houses for anything but dwelling-houses. I borrow the very words of the judgment. The Defendants in this case are attempting to authorize the use of part of the estate "for a purpose inconsistent with the law by which" they or their predecessors as trustees professed to bind the whole.

The only possible distinction between the act they propose to do and that of *Spicer* is, that they are proposing to authorize the new purchasers, without compelling them to enter into a covenant. *Spicer* was about to do the same as to three of the houses which *Brett* was to take; as to others he was going to release the covenants which former lessees from him had entered into. If there is any difference in this distinction I am not able to appreciate it.

Therefore if in the present case the trustees were not bound by a covenant, as I think they are, I should hold they were bound by an implied contract restricting their dealing with the land in question in violation of the building scheme.

Purchasers with notice of such an agreement are as much bound as the parties to the agreement. Lord *Cottenham* in *Tulk* v. *Moxhay* (1), says: "That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

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(1) 2 Ph. 778.

The purchasers who bought in September last with notice of this contract are bound by it also.

Two other points were raised on behalf of the Defendants which I must notice.

Mr. *Renshaw* faintly, but his junior with much earnestness, argued that if there were any contract restricting the number of houses on the unsold plots it would be void for perpetuity. The argument was attempted in *Coles* v. *Sims* (1), and it was expressly decided that such a contract was not obnoxious to the rule. But the case which is most against this view is that upon which the argument was founded, *London and South Western Railway Company* v. *Gomm* (2). In that case the Court of Appeal overruled two cases which had decided that a limitation of property was not obnoxious to the rule, if the person to take under that limitation could release it. But it also decided that mere contracts, whether by deed or not, are not within the rule, which only applies to limitations of property. The judges expressed an opinion that a contract by *A.* to sell land to *B.* or his heirs, at a fixed price, upon notice in writing given by *B.* or his heirs, created an interest in land, and that there was no real distinction in equity between such a contract and a limitation by which upon such payment the estate would vest in *B.* and his heirs. No doubt that doctrine is entirely novel. But there is nothing in the case which gives the smallest ground for the contention that a covenant by a vendor or purchaser restricting the use of land reserved or sold is within the rule against perpetuity.

Another argument was this. The vendors, it was urged, were trustees, and though they had power to sell, a sale with restrictive covenants would not be a proper exercise of that power. Counsel admitted that the sales which were made in September last were just as bad in this respect, because they were made subject to conditions similar in kind though not the same. Under such circumstances the argument is rather surprising.

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(1) 5 D. M. & G. 1.

(2) 20 Ch. D. 562.

I am of opinion that the building scheme was within the powers of the trustees. I have no doubt that it was the best and most lucrative mode of dealing with the estate, and that they have received much more under it than could have been made by sale of the land in any other way. I have no reason to suppose that the conditions imposed were depreciatory. I should infer just the contrary, even if the land now in question remained unsold.

There must be an injunction against the Defendants, restraining them from authorizing any purchaser from them of any of the plots of land comprised in the building scheme, and coloured green upon the plan annexed to the so-called deed-poll, to build upon each plot more than one house contrary to such building scheme.

The Defendants must pay the costs of the action.

Solicitors: *Frere, Forster & Co.*: *Parish & Hickson.*

C. C. M. D.

In re WELLS.
WELLS *v.* WELLS.

NORTH, J.
1889
Dec. 7.

[1889 W. 3279.]

Infant—Maintenance—Accumulations—Vested Life Estate—Right to Accumulations during Minority—Apportionment of Maintenance as between Contingent and Vested Life Estates—Conveyancing and Law of Property Act 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2.

A testator bequeathed a legacy to his trustees, upon trust, if and when *R.* should attain twenty-one, to pay the income thereof to her during her life, with remainders over. And the testator bequeathed to his trustees one-sixth part of the proceeds of the residue of his estate, upon trust to pay the income thereof to *R.* for her life. The will empowered the trustees in their discretion during the minority of *R.* to apply the whole or part of the income of the legacy for her maintenance, and directed that the surplus should be accumulated so as to follow the *corpus* of the fund from which it arose. The testator died in March, 1884. *R.* attained twenty-one in May, 1889. In July, 1886, an order was made that £200 per annum should be allowed for her maintenance, and that the trustees of the will should, out of the funds subject to the trusts thereby declared in favour of the infant, pay on account of the maintenance £100 a year to her guardian. The residue of the £200 was to be paid out of other property to which she was entitled. After the date of this order, and thenceforth during the minority of the infant, the trustees paid the £100 a year to the guardians out of the gross income arising from the legacy and the share of residue, without distinguishing between the two funds, and accumulated the surplus. The income produced by the legacy was less than £100:—

Held, that *R.* was, within the meaning of sub-sect. 2 of sect. 43 of the *Conveyancing Act*, 1881, so far as the accumulations had arisen from the income of the share of the residue, the person who had become ultimately entitled to the property from which they had arisen, and that they must be paid to her:

Held also, that, the trustees not having exercised any discretion as to the fund out of which the allowance for maintenance should be paid, the Court would now exercise that discretion and direct that it should be deemed to have been paid primarily out of the income of the legacy, that being most for the benefit of *R.*

ORIGINATING SUMMONS by the trustees of the will of *Michael Wells*, the elder, deceased, for the determination of certain questions, without any administration by the Court of the testator's estate.

The testator by his will, dated the 26th of April, 1883, devised

NORTH, J.
1889
In re WELLS.
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and bequeathed to his trustees the sum of £2600, upon trust to invest the same as therein mentioned. Also his freehold house, called *Orchard House*, upon trust that they should stand possessed of the said trust fund and the said freehold hereditaments, and the annual income arising from the same, upon trust, as to one moiety thereof respectively, if and when his granddaughter *Rose Wells*, the child of his own son *Michael Wells* deceased, should attain the age of twenty-one years or marry under that age, to pay the income arising from such moiety to her during her life, for her separate use without power of anticipation, and from and after her death should stand possessed of the said moiety of the said trust fund and freehold hereditaments, and the annual income thereof, in trust for her children as therein mentioned, with remainders over: Provided always, that, if *Rose Wells* should be under age or unmarried at the testator's decease, the trustees might in their discretion apply the whole, or such part as they should think fit, of the income arising from the said moiety for the maintenance, education, and support of the said *Rose Wells*, and such part of the said income as might not be required for such purposes should be accumulated and invested, so as to follow the *corpus* of the fund or premises from which it arose. And the testator devised and bequeathed the residue of his real and personal estate to his trustees, upon trust to sell and convert and invest the same as therein mentioned. And the testator directed his trustees to stand possessed of his residuary estate, and the proceeds and investments thereof, upon trust, as to one equal third part thereof, to pay the annual income thereof to his daughter *Elizabeth Wells* for her life, for her separate use without power of anticipation. And, after her decease, upon trust for her children as therein mentioned, with remainders over. And, as to one-sixth part of his residuary estate, he directed his trustees to hold the same upon the same trusts in favour of *Rose Wells* and her children as were thereinbefore declared in favour of his daughter *E. Wells* and her children, with remainders over. The other moiety of the legacy of £2600 and of the freehold house, and another one-sixth part of the residue were respectively to be held by the trustees upon trusts for the benefit of the testator's granddaughter *Christina Wells* and her children respectively, similar to those declared of the first moiety and the first one-sixth respectively in favour of *Rose Wells* and her children, with remainders over.

The testator died on the 23rd of March, 1884. At the time of his death *Rose Wells* and *Christina Wells* were both infants and unmarried. They were respectively entitled to other benefits under the will of their father *Michael Wells*, the younger.

On the 23rd of July, 1886, an order was made by Mr. Justice *North* in the matter of the two infants, appointing *Rebecca Beville*, their paternal aunt, guardian of their persons during their respective minorities. And it was further ordered that the sum of £200 should be allowed for the maintenance of *Rose Wells*, and the sum of £190 for the maintenance of *Christina Wells*. And it was ordered that the trustees of the will of *Michael Wells*, the younger, should, out of the funds subject to the trusts declared by that will in favour of the infants, pay to the guardian on account of such maintenance the sum of £195 by equal half-yearly payments. And it was ordered that the trustees of the will of *Michael Wells*, the elder, should pay to the guardians on account of such maintenance the sum of £195, out of the funds subject to the trusts declared by that will in favour of the infants, by equal half-yearly payments.

Rose Wells attained twenty-one on the 21st of May, 1889.

Down to that time the trustees of the will of the testator *Michael Wells*, the elder, paid the sums allowed for the maintenance of the two infants respectively out of the income arising from the £2600, the freehold house, and the two one-sixth shares of residue belonging to the infants respectively, without making any distinction between the different funds, and accumulated the surplus income, all the accumulations being blended together. The income arising from the £2600 and the house was in fact not sufficient to pay the allowance of £195.

The Defendants to the summons were *Rose Wells, Christina Wells*, and Mrs. *Beville* and her son, who was interested in the testator's residuary estate. The questions asked were, (1) whether *Rose Wells* was entitled to payment or transfer of the whole of the accumulations arising during her minority from one moiety of the £2600 and of the freehold house, and from her share of the residuary estate of the testator, or whether any and what part of such accumulations ought to be invested upon the trusts respectively affecting the same under the will, and in such case in what manner the payments made for her maintenance ought to be apportioned between the income of the respective trust funds? (2) out of the income of what fund subject to the trusts of the will in favour of *Christina Wells* should her maintenance be provided for, or how such provision should be apportioned between the income of such funds respectively?

The Plaintiffs made an affidavit in which they said that they had not exercised any discretion, but that, if they had been required to exercise their discretion, they would have paid the allowance for the maintenance of the infants in the first instance out of the income derived from the £2600 and the freehold house, before applying for that purpose the income of any property in which the infants took vested interests, and the Plaintiffs said that they were desirous of now exercising their discretion in that way, both as to the past and in the future, if the Court should be of opinion that they were at liberty to do so.

James Rolt, for the Plaintiffs:—

The question is, whether the Court will attribute the allowance for the maintenance of the infants to that fund to which it is most for their benefit that it should be attributed, *i.e.*, to the income to which they are entitled contingently on attaining twenty-one, so that the accumulations may be treated as having arisen from the income of the shares of residue to which the infants are absolutely entitled. The right to the accumulations depends on the construction of sub-sect. 2 of sect. 43 (1) of the *Conveyancing Act*, 1881.

(1) Sect. 43 provides: (1) "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2) The trustees shall accumulate all the residue of that income in the

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Colt, for *Rose Wells* and *Christina Wells* :—

The accumulations, so far as they have arisen from the income of her share of residue, belong to the Defendant *Rose Wells.* She is the person who, within the meaning of sub-sect. 2 of sect. 43 has ultimately become "entitled to the property" from which they have arisen. The "property" is the income in which she has a vested interest; the word "property" does not necessarily mean "capital." It was not intended by sub-sect. 2 to take away the accumulations of an infant's income and give them to some one else. That this is the right construction of sub-sect. 2 is shewn by *In re Buckley's Trusts* (1). The decision there was upon the construction of sect. 26 of *Lord Cranworth's Act* (22 & 23 Vict. c. 145), but for the present purpose the words of the two sections are identical. The trustees could have exercised their discretion by paying the allowance for maintenance primarily out of the income arising from the moiety of the £2600 and of the house; as they have not exercised their discretion at all, the Court can now exercise it for them, and can attribute the past payments for maintenance primarily to the income of the moiety. *Lucas* v. *King* (2) is an authority for doing this. And, as regards the infant *Christina Wells,* directions can be given that the allowance for her maintenance shall in future be paid primarily out of the income of her moiety of the £2600 and of the house.

Marcy, for persons interested in the residue :—

The words in sub-sect. 2 of sect. 43—"the person who ultimately becomes entitled to the property from which the same

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way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

As regards the present question the words of sect. 26 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145) are substantially the same as those of sub-sect. 2 of sect. 43 of the *Conveyancing Act*, 1881.

(1) 22 Ch. D. 583.

(2) 11 W. R. 818.

arise"—mean the person who becomes entitled to the *corpus*. The accumulations have arisen from the *corpus*. In *In re Buckley's Trusts* (1) there was no tenancy for life; the infant might have become entitled to the *corpus*.

[NORTH, J.:—But he did not.]

As regards the Defendant *Rose Wells*, it is too late to exercise the discretion as to apportionment between the two funds now; the payment for her maintenance has come to an end. In *Lucas* v. *King* (2) this objection was not taken.

NORTH, J.:—

I think the case is quite clear. In my opinion the accumulations of the income of her share of the residue belong to the Defendant *Rose Wells* absolutely. I think *In re Buckley's Trusts* is exactly in point. I am by no means satisfied that the expression in sub-sect. 2, "the property from which the same arise," does not mean the income from which the accumulations have arisen. It is not necessary to say that "property" means capital exclusively. I am prepared to hold that *Rose Wells* is the person who has become ultimately entitled to the property from which the accumulations have arisen. The object of the *Conveyancing Act* was to shorten and simplify conveyances, and it was not intended to alter the devolution of property.

With regard to making the apportionment of the allowance for maintenance between the two funds, *Lucas* v. *King* is an authority in point, and shews that I have power to do so now. If the trustees had exercised their discretion in the matter, I am not satisfied that I could have interfered with what they had done. But it is clear that they have not exercised any discretion. They have simply received the income of the infant as a whole, both that arising from her share of the residue and that arising from the moiety of the £2600 and of the house, and have taken out of the whole the sum allowed for her maintenance and have accumulated the surplus. *Lucas* v. *King* is an authority for my now saying that the allowance for maintenance shall be deemed to have been paid primarily out of that fund from which it was most for the infant's benefit that it should be taken, that is, out of the income of the moiety of the £2600 and of the house. The trustees will now be entitled to exercise their discretion with regard to the future payments for the maintenance of the infant *Christina Wells*.

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(1) 22 Ch. D. 583.

(2) 11 W. R. 818.

MINUTES OF ORDER:—Declare that, as between the legacy of £2600 and the freehold house and the residue of the testator's estate, the sum allowed for the maintenance of the infants ought to be deemed to have been paid primarily out of the income of the former, and that *Rose Wells* is now absolutely entitled to the accumulations which have arisen from the income of the share of residue which is given to her for her life.

Declare that the trustees are now entitled to exercise their discretion as to the fund out of which the sum allowed for the maintenance of the infant *Christina Wells* is to be paid for the future.

Solicitors for all parties: *R. B. Wheatley, Sons, & Daniel.*

W. L. C.

FAITHFULL *v.* WOODLEY.

[1889 F. 1570.]

NORTH, J.
1889
Dec. 14.

Practice—Judgment in default of Pleading—Admissions by Defendant—Foreclosure Action—Personal Judgment against Mortgagor—Form of Judgment—Rules of Supreme Court, 1883, *Order* XIX., *r.* 13; *Order* XXVII., *r.* 11; *Order* LV., *r.* 5A.

The Defendant to a foreclosure action did not appear to the writ. The Plaintiff by his statement of claim alleged that a specified amount was due to him in respect of principal and interest, but asked that an account might be taken of what was due. On a motion by the Plaintiff for judgment in default of pleading, the Defendant did not appear:—

Held, that, as the Defendant had not appeared on the hearing of the motion, the Plaintiff was, notwithstanding the Defendant's omission to plead, not entitled to any relief which he had not asked by his statement of claim, and that, consequently, he was not entitled to immediate judgment upon the Defendant's covenant for payment of the amount alleged to be due, but that the judgment must be for payment of the amount found to be due upon taking the account in Chambers.

MOTION by the Plaintiff for judgment in default of pleading by the Defendant.

NORTH, J.
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The action was for foreclosure, the mortgagor being the sole Defendant.

The Defendant did not enter an appearance to the writ. A statement of claim was filed which contained allegations to the following effect:—

By deed dated the 5th of November, 1887, the Defendant, in consideration of £100 lent to him by the Plaintiff, covenanted to pay to the Plaintiff £100, with interest therefor at 7 per cent. per annum on the 5th of December then next, and also covenanted that, in case the principal sum should remain unpaid after that day, he would, so long as it or any part thereof should remain unpaid, pay to the Plaintiff interest at the same rate for the principal sum, or for so much thereof as should for the time being remain unpaid, as therein mentioned. And the Defendant further covenanted with the Plaintiff that he would, at any time thereafter, while the principal sum or any part thereof should remain unpaid, upon the request of the Plaintiff, effectually assign, demise, or otherwise assure unto the Plaintiff all the hereditaments comprised in a certain indenture of lease, either for the whole residue then to come of the term of years thereby created, or, if the Plaintiff should so require, for such residue except the last day thereof, by way of mortgage for securing the payment of the Plaintiff of the principal sum, or so much thereof as should for the time being remain unpaid, with interest, and that, until the mortgage should be executed, the leasehold premises should be a security to the Plaintiff, and be charged with the payment to him of the principal sum and interest, and should be held by the Defendant in trust for the Plaintiff, his executors, administrators, and assigns. The Defendant afterwards charged the premises with the payment to the Plaintiff of two further sums of £50 and £25 and interest thereon respectively. The statement of claim alleged that "the said principal sums of £100, £50, and £25, are still due to the Plaintff upon the securities aforesaid, with £12 19*s.* 6*d.* for interest thereon up to the 5th of November, 1889, and interest on the aggregate sum of £175 from the 5th of November, 1889. No mortgage has been executed of the leasehold premises pursuant to the covenant aforesaid."

The Plaintiff claimed an account of what was due to him under and by virtue of his securities; payment of the amount found due to him; and in default of payment to have his securities enforced by foreclosure or sale, and an assignment of the leasehold premises for the residue of the term, and possession of the premises.

J. G. Wood, for the Plaintiff:—

I ask for judgment against the Defendant on his personal covenant, without taking the account, for the amount of principal and interest admitted to be due. By not pleading the Defendant has admitted the amount of principal and interest as alleged by the statement of claim to be due: Order XIX., rule 13. I ask for judgment in the form approved by the Court of Appeal in *Farrer* v. *Lacy, Hartland & Co.* (1), as applicable to a case in which the debt and interest is admitted.

The Defendant did not appear.

NORTH, J.:—

The Defendant's admission must be taken as made only for the purpose of the relief which is asked by the statement of claim. Here the Plaintiff has asked that an account may be taken of what is due by the Defendant on his covenant. I am not aware of any case in which relief not asked by the statement of claim has been given against a Defendant who did not appear at the trial of the action. I make the same order as was actually made by me in *Farrer* v. *Lacy, Hartland & Co.* (2), that is, for payment by the Defendant of the amount which shall on taking the account be found due from him upon his covenant, within a month after the date of the certificate: which was confirmed by the Court of Appeal (1).

Solicitors for Plaintiff: *Faithfull & Owen.*

W. L. C.

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(1) 31 Ch. D. 51.

(2) 25 Ch. D. 636.

STIRLING, J.

1889

Oct. 30, 31.

FISHER *v.* SHIRLEY.

[1889 F. 433.]

Marriage Settlement—Wife's after-acquired Property—Covenant by Husband to settle—Wife's Reversionary Interest—Fund falling into Possession after Wife's Death—"During Coverture"—Implied Restriction of Covenant.

A general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives, though it will be so restricted when the wife survives.

By a marriage settlement made in 1841 certain property belonging to the wife (who was a minor) was settled, and it was agreed and declared and the husband covenanted with the trustees that if the wife, or he in her right, should become entitled to any other property whatsoever the same should be settled on the trusts of the settlement.

At the date of the marriage the wife was, under a settlement made in 1833, entitled to a vested interest in an unascertained share of a settled fund in reversion expectant upon the death of the survivor of certain persons.

The wife died in 1852, leaving the husband her surviving, and the reversionary fund did not become divisible until 1888, when the husband was still living:—

Held, that the wife's share in the fund was bound by the husband's covenant and must be paid to the trustees of the marriage settlement.

ADJOURNED SUMMONS.

By a deed-poll, dated the 6th of June, 1833, a sum of £3866 7*s.* 3*d.* Reduced Bank Annuities was settled upon trust to pay the interest, dividends, and annual proceeds thereof to *Caroline Hannah Neave* during her life, and after her decease to *Caroline Mary Cookson* for her separate use, and after her decease to *William Cookson* during his life, and after the decease of the survivor of those three persons, upon trust that the trustees should pay, assign, and transfer the said sum of Bank Annuities and the investments thereof unto, between, and amongst all and every the children of the said *William Cookson* and *Caroline Mary* his wife, as well those born as thereafter to be born, equally, share and share alike, the share or shares of a son or sons to be transferred and paid to him or them as and when he or they should attain the age of twenty-one years, and the share or shares of a daughter or daughters to be transferred or paid to her or them as and when she or they should attain the age of twenty-one years or upon her or their marriage or respective marriages, which should first happen after the decease of the said *William Cookson* and *Caroline Mary* his wife, and in case such ages or times should happen in the lifetime of either of them the said *Caroline Hannah Neave*, *William Cookson*, and *Caroline Mary* his wife, then the share and shares of such child or children of and in the said Bank Annuities and the investments thereof should be vested and transmissible interests in such children respectively at the ages and times aforesaid, but the actual payment or transfer thereof should be postponed until after the decease of the said *Caroline Hannah Neave*, *William Cookson*, and *Caroline Mary* his wife.

William Cookson and *Caroline Mary* his wife had five children, of whom *Georgina Emily* was one.

Georgina Emily Cookson on the 21st of August, 1841, married *Arthur George Sewallis Shirley*. At the time of her marriage she was under the age of twenty-one years, and all the three persons who were entitled to life interests under the deed-poll of the 6th of June, 1833, were alive.

By the settlement made upon this marriage, and dated the 20th of August, 1841, it was recited that by virtue of a deed of settlement dated the 9th of June, 1819, and made upon the marriage of her parents, *Georgina Emily Cookson* was or might be entitled to various trust moneys, stocks, funds, and securities, and might become entitled to further trust moneys, stocks, funds, and securities after the death of her parents, and on other contingencies, and that the value of the fund in which she had then an expectant share under the said last-mentioned settlement was under £2000, and that it had been "agreed that all such moneys, stocks, funds, and securities, and all property that she, or the said *Arthur George Sewallis Shirley* in her right, shall hereafter become entitled to under any deed, will, intestacy, or otherwise howsoever, shall be assigned to trustees, and shall be settled and secured upon the trusts" thereinafter declared. And by the deed of settlement *Georgina Emily Cookson* assigned to the trustees thereof, *inter alia*, all moneys, stocks, funds, and securities to which under or by virtue of the settlement of the 9th of June, 1819, she then was or thereafter should or might become entitled after the decease of the said *William Cookson* and *Caroline Mary* his wife, or either of them, to hold the same upon the trusts thereinafter expressed.

And by the deed of settlement it was agreed and declared, and particularly the said *Arthur Shirley* covenanted, promised, and agreed with the trustees, "that if the said *Georgina Emily Cookson*, or the said *Arthur George Sewallis Shirley* in her right, shall become entitled to any part, share, or shares of the trust moneys, stocks, funds, and securities, her shares whereof are hereby settled as aforesaid, or shall by deed, gift, intestacy, or by any other means whatever become entitled to any other moneys, stocks, funds, or other property whatsoever, the same shall (at the cost and charges of the said trust fund) by all such acts, deeds, and assurances as shall be necessary for the purpose, be vested in the trustees or trustee for the time being under these presents, and shall be held by the said trustees or trustee on the same trusts and subject to the same powers, provisions, and declarations as are hereby expressed, declared, and contained of and concerning the moneys and premises hereby settled by and on the part of the said *Georgina Emily Cookson*."

It did not appear that Mrs. *Shirley* ever ratified the settlement, and she died on the 8th of July, 1852, leaving her husband *Arthur George Sewallis Shirley* and certain children of their marriage her surviving.

Early in the year 1884 *Arthur George Sewallis Shirley* filed a petition for the liquidation of his affairs, and on the 10th of April, 1884, all his property, whether in possession, reversion, or remainder, was assigned by the trustee under the liquidation to the Defendant *Henry Dyne*. *Caroline Mary Cookson*, the last survivor of the persons entitled to the life interests in the fund settled by the deed-poll of the 6th of June, 1833, died on the 16th of August, 1888, and the fund having thereupon become divisible, it was contended on behalf of the assignee of Mr. *Shirley's* trustee in liquidation that the share of the late Mrs. *Shirley* in the fund, being a vested reversionary interest which did not fall in possession during the coverture, was not bound by the covenant entered into by Mr. *Shirley* upon his marriage with Mrs. *Shirley* (who was at that time an infant) and that her share passed accordingly to Mr. *Shirley* and was now payable to the assignee of his trustee in liquidation.

This was an originating summons taken out by *Osmond Fisher* and *Edgar William de Crackanthorpe Cookson*, the present trustees of the deed-poll of the 6th of June, 1833, in order (*inter alia*) to have the question determined whether such share was bound by the covenant and payable to the trustees of the settlement, or to what other person or persons the same was payable.

A. J. Spencer, for the Plaintiffs.

Bradley Dyne, for the assignee:—

At the date of the settlement made upon the marriage of Mr. and Mrs. *Shirley* her interest in the fund settled by the deed-poll was an unascertained reversionary interest, and it never fell into possession until long after the determination of the coverture. It is true that there are no words in the covenant limiting its application to the continuance of the coverture. But upon the authority of a series of cases a covenant of this character by a husband only applies to property falling under his control during the coverture, and must be construed as if the words "during the said intended coverture" had been inserted: *Dickinson* v. *Dillwyn* (1); *Carter* v. *Carter* (2). This share, therefore, is not covered by the husband's covenant; and as, on taking out letters of administration to his wife's estate, he would have been entitled to have it paid to him, it passes to the assignee of his trustee in liquidation.

Hadley, for the trustees of the marriage settlement:—

There is no rule that all covenants by a husband to settle his wife's other or after-acquired property must be construed as limited only to property acquired during the coverture. The primary object of these covenants is to prevent the wife's other or after-acquired property from coming within the sole control of the husband, and accordingly, where the wife has been the survivor, and the reason for the covenant is no longer in operation, the Court has construed a covenant in general terms as restricted to the duration of the coverture. But the Court has never done this in any case in which the husband has been the survivor: *In re Edwards* (1); *Howell* v. *Howell* (2); *Reid* v. *Kenrick* (3); *Godsal* v. *Webb* (4); *In re Campbell's Policies* (5).

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(1) Law Rep. 8 Eq. 546.

(2) Law Rep. 8 Eq. 551.

Bradley Dyne, in reply.

STIRLING, J.:—

In my opinion Mr. *Hadley's* contention is right. The question is whether a share in certain property, in which the wife had a reversionary interest at the time of the marriage, but which did not become an interest in possession during her life, is bound by the covenant on the part of the husband, contained in the settlement, to settle other moneys or property of the wife, or of the husband in her right. That covenant is expressed in quite general terms. [His Lordship read the covenant, and continued:—] There are no words that I can see in that covenant which limit the operation of it to funds falling into possession during the coverture, or during any other period. It is an absolute covenant so far as the husband is concerned. But I am asked to say that the property in question is not bound by that covenant in the event which has happened, namely, the death of the wife before the fund has fallen into possession, leaving the husband surviving; and that the husband is entitled, upon taking out letters of administration to his wife's estate, to have that property transferred to him absolutely. In support of that contention it is said that there is a series of cases which settle that a covenant of this nature is to be construed as if it were limited to property to which the wife should become entitled during the coverture only. The circumstances in those cases, however, were quite different. They were cases where the wife was the survivor. The object of the limitation in such cases is stated by Lord Justice *James* in *In re Edwards* (6) as follows: "The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore *primâ facie* is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death. We have consulted the Lord Chancellor on the case, and he agrees with us in the opinion that, in the absence of any expressions shewing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words, 'during the said intended coverture,' had been inserted." No doubt, the concluding words of the Lord Justice in that judgment at first sight support the contention on behalf of the husband. But when the literal construction of a covenant is departed from one ought to look at the reason for so doing, and the reason assigned is that the object of the covenant is to protect the property, the subject of the covenant, from the husband's marital right, and preserve it for the benefit of the wife and children. There is no need to protect property against the husband's marital right where the wife does not become entitled until after the husband's death: but there is need of such protection where the husband is the survivor, and the property falls in after the wife's death. If effect were given to the husband's claim his marital right would be enforced instead of the wife's property being protected against it, and the very object of the covenant would be defeated. The words of the covenant in the present case are quite general, and the reason assigned for limiting them does not appear to apply, and, in my opinion, they cannot in the present case be limited as suggested. Accordingly, the property is bound by the covenant on the part of Mr. *Shirley* contained in the settlement, and I declare that the trustees of the settlement of the 20th of August, 1841, are entitled to the share of Mrs. *Shirley* settled by the deed-poll of the 6th of June, 1833. I cannot give any costs to Mr. *Dyne's* client.

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(1) Law Rep. 9 Ch. 97.
(2) 4 L. J. (N.S.) (Ch.) 242.
(3) 24 L. J. (Ch.) 503.
(4) 2 Keen, 99.
(5) 6 Ch. D. 686.
(6) Law Rep. 9 Ch. 100.

Solicitors: *Janson, Cobb, Pearson, & Co.*, agents for *Tozer, Geare, & Mathew, Exeter*; *Prior, Church, & Adams*, agents for *Dyne & Müller, Bruton, Somerset*; *Cole & Jackson*, agents for *Francis & Francis, Cambridge.*

W. W. K.

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Nov. 1, 2, 4.

WORMAN *v.* WORMAN.

[1888 W. 2365.]

Settlement—Investment—Purchase of Equity of Redemption—Breach of Trust—Previous Administration Action compromised—Res Judicata.

In 1874 *A.* settled certain funds upon trust for himself for life, and after his death upon trust, as to one fifth, for *W.* and his children. By the settlement *A.* reserved to himself for life the power to direct the investments of the trust funds as though he were absolute owner; and, after his death, the trustees were empowered to invest the trust funds upon freehold, leasehold, or chattel real securities "including equitable mortgages by a deposit," with the usual power to vary investments. The settlement also contained the usual power to invest in the purchase of freeholds or long leaseholds.

In 1877 *A.* died, and at that time £6400, part of the trust funds, stood invested on second mortgage of certain freeholds and leaseholds, *S.* being the mortgagor. In 1878 *S.* became financially embarrassed, foreclosure or sale by the first mortgagees was imminent, which would have resulted in the total loss of the £6400, and thereupon the trustees, acting *bonâ fide* and with a view to save the trust estate, purchased of *S.* his equity of redemption for £2000.

In 1879 *L.*, a beneficiary, commenced an action against the trustees and *W.*, alleging improper investments, and claiming administration and accounts on the footing of wilful default. The trustees, in their answers to interrogatories, set out clearly the circumstances attending the purchase of the equity of redemption. In 1880 the usual judgment for administration was obtained, including an inquiry as to the improper investments. In 1881, before the Chief Clerk made his certificate, a compromise of the action was sanctioned by the Court on petition, to which all parties interested (including *W.*'s children) were parties, under which *L.*'s share of the trust estate was raised and paid out to her, and all further proceedings in the action were stayed. The petition did not refer to the alleged breaches of trust.

In April, 1888, *W.*'s children commenced an action against the same trustees alleging that the purchase of the equity of redemption was a breach of trust and claiming usual relief. The Defendants denied the breach of trust and asserted that under the circumstances the purchase was prudent and proper. They also pleaded the order of compromise in the first action in bar of the Plaintiff's claim:—

Held, (1) that the purchase of the equity of redemption was an unauthorized investment and a breach of trust; (2) that the compromise was not a bar to the Plaintiff's claim, the breach of trust not having been by negligence, inadvertence, or accident, omitted to be brought before the Court on the hearing of the petition.

Henderson v. *Henderson* (1) discussed.

BY deed dated the 11th of April, 1874, and made between *J. Smith* (settlor) of the one part, and the said *J. Smith* and the Defendants *J. C. Worman* and *Elizabeth Worman* (trustees) of the other part, the proceeds of sale of two leasehold houses (conveyed to the said Defendants by deed of even date upon trust for sale) and the sum of £10,300 were settled upon such trusts, &c., as the said *J. Smith* should by deed or will appoint, and in default of appointment (which happened) upon trust during the life of the said *J. Smith* to invest the said trust funds in such manner as the said *J. Smith* should in his uncontrolled discretion, and as if he were absolute owner, from time to time direct; and upon further trust to pay the income of the said trust funds to the said *J. Smith* during his life. And it was thereby declared that the trustees or trustee for the time being should stand possessed of the said trust funds, after the death of the said *J. Smith*, upon trust to pay thereout certain sums of money, and should stand possessed of the residue of the said trust funds upon trust to invest the same in manner thereinafter provided, and should stand possessed of the said trust moneys and the investments thereof upon trust to divide the same into five equal parts, which for convenience of reference were thereinafter referred to as follows, namely, one such fifth part as the share of *R. A. J. Worman*, one other fifth part as the share of the Defendant *J. C. Worman*, one other fifth part as the share of the Defendant *Elizabeth Worman*, one other fifth part as the share of *Georgina E. Loughnan*, the wife of *T. C. Loughnan*, and the remaining fifth part as the share of *M. A. Worman*. And it was thereby declared that the said trustees and trustee should stand possessed of the share of the said *R. A. J. Worman* in trust to pay the income to him during his life, and after his death the said share should be in trust for his children as he should by will appoint, and in default of appointment (which happened) in trust for his children who being sons should attain the age of twenty-one, or being daughters should attain that age or marry under that age in equal shares. The settlement contained a power for the trustees, after the death of *J. Smith*, to invest in any of the public stocks or funds, or government securities of the *United Kingdom* or *India*, or any colony or dependency of the *United Kingdom*, or upon freehold, copyhold, leasehold, or chattel real securities in *England*, *Wales*, or *Ireland* (including equitable mortgages by a deposit) . . . with power to vary investments; and also a power, after the death of *J. Smith*, to invest the trust funds in the purchase of any freehold hereditaments in *England* or *Wales*, or of any leasehold hereditaments in *England* or *Wales* for any term of years whereof not less than seventy years should be unexpired, to be conveyed in the usual way to and upon the trusts of the settlement.

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(1) 3 Hare, 100.

J. Smith died in October, 1877, and at the time of his death £6400, part of the trust funds, had been invested by his direction on second mortgage of four freehold houses, Nos. 1, 2, 3 and 5 *Harrington Mansions*, and of two long leasehold houses, Nos. 4 and 6 *Penywern Road*. The first mortgage on the freeholds, which also comprised other properties, amounted to £58,000; and the first mortgage on the leaseholds amounted to £3300. The mortgagor in each case was one *Matthew Scott*.

Shortly after the death of *J. Smith*, *Matthew Scott* became financially embarrassed, and it was certain that the first mortgagees of the freeholds would either sell or foreclose the property in the event of his becoming a bankrupt, which it was ascertained he would certainly be, unless he could realize the equities of redemption in which he was interested. In the event of foreclosure or sale the said sum of £6400 would have been entirely lost, and to obviate this loss the Defendants, in the month of January, 1878, agreed with *Matthew Scott* to purchase his equity of redemption in the said freehold and leasehold houses for £2000; and it was also part of the agreement that the other properties comprised in the first mortgage of the freeholds should be sold and the proceeds applied in reduction of that mortgage. This arrangement was carried into effect, but it was not until the 12th of March, 1884, that *Matthew Scott* by deed conveyed the equity of redemption in the said freeholds and leaseholds to the Defendants, subject, as to the freeholds, to the moneys due on first mortgage (then reduced by sales to £19,500), and as to the leaseholds to the said mortgage of £3300.

In December, 1878, an action entitled, "In the matter of the estate of *J. Smith, deceased, Loughnan* v. *Worman*" (1878 S. No. 523) was commenced in the Chancery Division of the High Court by the said *Georgina Loughnan* and *T. C. Loughnan* against the said Defendants and *R. A. J. Worman,* alleging that the Defendant trustees had made investments not authorized by the said settlement, and claiming (*inter alia*) to have the trusts of the settlement administered by the Court, and that in taking the accounts the Defendant trustees might be charged on the footing of wilful default with any loss arising from improper or unauthorized investment. By the judgment dated the 16th of June, 1880, in the said action the trusts of the settlement were ordered to be carried into execution, and various accounts and inquiries were directed, including an inquiry as to the alleged unauthorized investments. This judgment was served upon *R. A. W. Worman* and *J. J. E. Worman,* the two infant children of the said *R. A. J. Worman,* and under an order of Court they had liberty to attend the proceedings. Before the Chief Clerk made his certificate a petition was on the 13th of June, 1881, presented in the said action, to which the said infants were Respondents, praying (*inter alia*) that a partition might be made of the trust property, and that the sum of £2500, representing the one-fifth share of the Plaintiff *G. E. Loughnan* might be raised out of the trust property and paid to two trustees for her.

The alleged breaches of trust were not mentioned or referred to in this petition, but the circumstances under which the equities of redemption had been purchased appeared in the Defendant's answer to the interrogatories which had been filed before the petition was presented.

By the order made on the 27th of July, 1881, on the hearing of the said petition, it was declared that it was for the benefit of the Respondents, the said infants, that the action should be compromised and all proceedings therein stayed upon the terms above mentioned, and it was ordered that all further proceedings in such action should be stayed except for the purpose of carrying such order into effect. This compromise was carried into effect.

In April, 1888, *R. A. J. Worman* died leaving two children only, viz., the said *R. A. W. Worman* and *J. J. E. Worman*, both of whom had attained twenty-one; and having by his will appointed his wife, *Sabina Worman*, his executrix, who duly proved the same.

In July, 1888, *Sabina Worman, R. A. W. Worman*, and *J. J. E. Worman* commenced the present action against the said Defendant trustees, alleging in their statement of claim that the purchase of the equity of redemption was an unauthorized investment and improper, and claiming a declaration accordingly, and consequential relief.

The Defendants by their statement of defence denied that the investment in question was unauthorized or improper, and asserted that under the special circumstances of the case it was a prudent and proper one. They also relied on the order of compromise in the previous action as a bar to the present action. Issue was joined. This was the trial of the action.

It was conceded that the Defendants had acted *bonâ fide* and with an anxious desire to do the best for the trust estate.

Warmington, Q.C., and *Theobald*, for the Plaintiffs:—

We do not complain of the investments made in the lifetime of the settlor by his direction. The period to consider is that after his death. Neither the power to invest on mortgage of real securities, nor the power to invest in the purchase of land, authorizes such an investment as this. There is no *dictum* in any text-book in its favour. Even if the investment were within the terms of the power to buy land, it is not such an investment as trustees ought to make. They ought not to buy an incumbered estate, but should get the legal estate free from incumbrances: *Lewin* on Trusts (1); *Ex parte Craven* (2). As to the prior action, the Plaintiff there was bought off, and this point was not before the Court on the petition for compromise, and was not decided. It is not *res judicata* at all, and is no answer to the present claim.

Hall, Q.C., and *C. P. Pauli*, for the Defendants:—

As to the investment: the settlor's practice was to invest on second mortgages, and the special words in the investment clause shew that he had equitable mortgages in view, and the power to vary investments may be read to mean "into or for equitable securities of a like nature." Then the power to invest in the purchase of land must also be construed in the light of the previous powers, and under the special circumstances of the case would include the purchase of an equity of redemption. There is no authority for the proposition that the purchase of an equity of redemption under the ordinary investment clause is a breach of trust, but it is not necessary for the purposes of this case to decide that point. In *Ex parte Craven* (1) the fund was in Court, and the application was under a special Act of Parliament. At any rate, under the special circumstances of this case what was done was not a breach of trust. The purchase of the equity of redemption was beneficial to the trust estate and saved a greater loss. Next, the whole question is *res judicata.* All that can be obtained in this action could have been obtained in the first action. Practically there has been no change in the position and rights of the parties. In that action there were the same parties, the same cause of action, the same subject-matter of complaint, the same relief claimed, as in this action. The judgment obtained was for the benefit of all the parties interested, including the present Plaintiffs, and the breaches of trust now complained of were clearly set out in the answers to interrogatories, but they chose to partition the trust estate and to stay all further proceedings against the trustees. That being so, the Plaintiffs cannot now open up the same cause of action because through negligence, inadvertence, or accident they omitted to bring it forward in the first action: *Askew* v. *Woodhead* (2); *Henderson* v. *Henderson* (3); *Serrao* v. *Noel* (4).

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(1) 5th Ed. p. 504.

(2) 17 L. J. (Ch.) 215.

Warmington, in reply, cited *Concha* v. *Concha* (5).

KEKEWICH, J.:—

There are two important points falling for decision in this case, and, although they both arise under one settlement made by

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(1) 17 L. J. (Ch.) 215.
(2) 21 W. R. 573.
(3) 3 Hare, 100.
(4) 15 Q. B. D. 549.
(5) 11 App. Cas. 541, 552.

James Smith in 1874, they must be considered separately. The first question is, whether the trustees of that settlement committed a breach of trust in purchasing the equity of redemption in property which was already mortgaged to them. During the life of *James Smith*, the settlor, who by virtue of the language of the deed had complete control over the trust funds, part of those funds had been invested on a second mortgage of the property with which we are concerned, partly freehold, partly leasehold. No question arises about that second mortgage, because it was made under *James Smith's* direction and he was entitled to direct such an investment. Therefore, the trustees were, at the time of his death, possessed of securities which would not ordinarily be held by trustees, but which were properly held by them under those circumstances. In 1884, for reasons which commended themselves to the trustees, they purchased the interest of the mortgagor—not paying off the first mortgage, but giving a sum of £2000 for the ultimate equity of redemption—that is to say, the equity of redemption as against the second mortgagees, namely, the trustees themselves; and that is all they did. There was a complicated transaction, and further money was expended in other ways, but the only money which was spent in acquiring the interest which they did acquire, which I have just described, was this sum of £2000. The question is, whether it was right of them to spend the money in that way. Now that must depend on the terms of the deed—in other words, the question is, whether that was a proper investment of the trust funds authorized by the deed. The trust investments authorized by the deed are described with reference to the period commencing with the death of *James Smith*, who, as I have already mentioned, had control up to that time; and in construing the language of the deed with reference to that period, the Court is, I think, bound to leave out of sight the fact, which until then was all important, that *James Smith* was the settlor and not merely dictated the terms of the deed but reserved to himself the full control. What he might have done in his lifetime; what he might be presumed to have thought desirable after his death, became, on the happening of that event, of no importance whatever. From that time the powers of the trustees must be guided by the terms of the deed, and no other standard. They are authorized to invest on divers securities, which comprise, among other things, freehold, copyhold, leasehold, or chattel real securities in *England*, *Wales*, or *Ireland*; and then follow words which, not perhaps in the most accurate language, authorize the trustees, contrary to the usual rule, to invest on an equitable mortgage, provided that equitable mortgage is effected in a particular way. The words are, "including equitable mortgages by a deposit." Those words in effect say, "which real securities shall, for the purposes of this deed, be deemed to include what they would not otherwise include, equitable mortgages by deposit, but not equitable mortgages effected in any other way." Then, after that, by a subsequent clause the trustees are empowered, in words which are of common form, to invest any of the trust funds in the purchase of freeholds, or leaseholds of a certain term, and which are to be conveyed to them on trust for sale; so that the property, though purchased and taken in their names, is preserved as really an investment of the trust funds. There is nothing there to suggest any enlargement of the ordinary powers granted to trustees when they are authorized to purchase freeholds or leaseholds. There is nothing there to suggest that they could purchase either an equity of redemption or take any other property than that which, on the ordinary construction of a clause of that kind, they would be authorized to take. But it is argued that it must be construed largely, because "equitable mortgages by a deposit" are included in the previous clause. To my mind there is no foundation whatever for any such argument. One must, of course, read the whole of a deed of this kind to understand it, and, where there is the slightest vagueness, one may look to see what language has been employed in a previous clause; but I cannot construe a power to invest in the purchase of land by such a phrase as "including equitable mortgages by a deposit" in an investment clause of a different character. Therefore I am brought back to the general question—can trustees who are authorized to invest in the purchase of land invest in the purchase of an equity of redemption? That is the question broadly stated, notwithstanding that here the trustees were themselves the holders of the second mortgage, and therefore the question may be a little different from the

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abstract proposition which I have mentioned. The counsel engaged in the case have been unable to find anything on the interpretation of such a clause as this in the works bearing on the practice of conveyancers; but the Court is entitled, either with or without any such information, to rely on its own knowledge of the practice of conveyancers, and certainly my experience is entirely against any such investment. It is quite new to me that trustees may purchase an equity of redemption under such a power as is here contained, which, as I have already said, is substantially in the common form; nor has any authority in the shape of decision been produced. Only one case has been referred to, *Ex parte Craven* (1), and there the point arose in a very peculiar way. Persons who were entitled to a sum of £1200 in Court paid in by a railway company were anxious to purchase an adjoining estate for £2800, and the difference between the £1200, which they had available, and the £2800, which was the purchase-money, was proposed to be provided by means of a mortgage. Of course, the proposed mortgagee would only take a first mortgage of the legal estate, and the result would have been that in the event there would have been conveyed to the uses of the settlement the equity of redemption—that is to say, the right to redeem the property which would have been mortgaged for £1600; and the Vice-Chancellor refused the application, because it was in effect proposed to invest the money in Court in the purchase of an equity of redemption, an investment which the trustees were not justified in making. The point before him was not whether trustees were justified in making it—because the money was paid into Court, apparently either under the *Lands Clauses Act* or one of those earlier Acts now represented by the *Lands Clauses Act*, and, as I gather from the report, the real question was not whether trustees were justified in making it, but whether it was an investment which the Court could properly sanction under the *Lands Clauses Act*. I should gather from the report, which necessarily is rather scanty, that what the Vice-Chancellor meant was that such an investment was not one which the trustees would be justified in making under the common form of a power of investment, and likewise it was not an investment the Court would be justified in sanctioning under the *Lands Clauses Act*. The application was made under the 69th section of the *Lands Clauses Act*, and that section authorizes money in Court to be invested in the purchase of other lands to be conveyed, limited and settled on the uses of the settlement. So far as it can be accepted as a decision at all, it seems to be one that the investment of money in the purchase of an equity of redemption is not an investment in the purchase of lands. That entirely confirms my own view of the real construction of such a clause as this. I think that on the proper construction an equity of redemption could not be purchased. An endeavour was made in the course of the argument to distinguish between what the trustees might do, and what the trustees ought to do, and to say that trustees are not to be held responsible for that which they may properly do according to the strict language of the deed, though it is not an investment which the Court, if appealed to, would have sanctioned on their behalf. But the question I have to consider is whether the trustees were justified by the language of the power to make this investment; and I hold that they were not so justified.

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(1) 17 L. J. (Ch.) 215.

The next question is an entirely different one. The present Plaintiffs are entitled to a share of the property settled by the deed of 1874. Other persons entitled to a share of the same property under the same settlement took proceedings in 1878 against the trustees and against *Robert Aloysius James Worman*, the father of the second and third Plaintiffs in this action, for the execution of the trusts of the settlement, and they alleged breaches of trust and improper investment of the trust fund. What those alleged improper investments were appeared in the answer of the Defendants to the interrogatories delivered for their examination, and the improper investments turn out to be precisely those which are complained of in this litigation. With that question raised generally by the statement of claim, but particularly disclosed by the answer to interrogatories, a judgment was pronounced on the 16th of June, 1880; and an inquiry was directed upon what securities the trust funds were invested, and whether they were properly invested, having regard to the powers of the settlement. Under that, no doubt, the whole story might have been brought out. The Chief Clerk might have found that this £2000 was invested in the manner in which it was in fact invested, and the impropriety of that investment might have been certified or ascertained by further proceedings in the action. But the action never went any further; the parties came to an agreement, and they agreed that the Plaintiffs in that action should take a sum of £2500, and should have no further interest in the settled funds at all. In other words, it was agreed that, they receiving the £2500, the trust fund should be divided as if they had not been interested in it, and it was necessary to have the sanction of the Court to that. The trustees were, of course, entitled to that sanction, and there being an action pending could not wisely have allowed the compromise to be carried out without such sanction; and, moreover, there were infants concerned, notably the two Plaintiffs in this case, and therefore the sanction of the Court was required to bind them. The matter was brought before the Court on petition, stating all the facts necessary for that purpose, but omitting any reference to the case which had been raised, and which was strictly and properly before the Court on the inquiries directed by the judgment, and the Court sanctioned the compromise, and bound the infants to accept it, so as to bind the Plaintiffs on the terms mentioned. It is said that the infants, as well as the trustees, having been parties to that compromise, are not now entitled to say that these investments shall be inquired into, and the trustees made liable for any impropriety in the expenditure of the £2000, and it is argued that it is *res judicata*. In support of that argument reference is made to the case of *Henderson* v. *Henderson* (1), and particularly to a passage in the judgment of the Vice-Chancellor on page 115. I acknowledge the exact propriety of the language used by the Vice-Chancellor in the passage on which Mr. *Hall* relies, which is this (2): "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

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(1) 3 Hare, 100.

(2) 3 Hare, 115.

But that sentence must be read with reference to that which immediately precedes it, where the Vice-Chancellor states the rule of the Court to be that "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case." It seems to me that this question of the impropriety of this investment could not have been brought forward, and cannot be regarded as having been by negligence, inadvertence, or accident, omitted to have been brought forward, on the hearing of the petition for a compromise. It is true that after judgment all are actors, and that any one of the parties to that litigation might have insisted on the inquiries directed by the judgment being proceeded with, and might have insisted on the point which was raised by the inquiry being made the subject of adjudication. But when the parties, with the sanction of the Court, were prepared to compromise their claims on the terms I have mentioned, it would have been improper then to have had this point raised. The trustees, no doubt, might have said, "We will not assent to this compromise, because there is the question open of the greatest importance to us, and we will insist on that point being determined." The answer would have been, "You are not concerned to have that question determined now. All that is proposed to do is to buy out the present Plaintiffs, and you will be in no worse or better position because the Plaintiffs are bought out; or rather, if you are in any altered position at all, you will have fewer persons to whom to account, and to that extent it will be rather better for you than worse." The other parties might have said, "We are content to buy out the Plaintiffs; we wish to reserve our rights against the trustees in regard to this alleged impropriety of investment." But the Court would have replied: "You must take care of yourselves about that, the only question is whether this compromise is to be sanctioned or

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not, and the fact that there may be a question remaining between you and the other parties interested and the trustees cannot possibly affect that compromise." I suppose that if the attention of the Court had been called to this question, some means would have been found of utilising the pleadings, the answer to interrogatories, and the judgment; but, notwithstanding that, there must have been some independent proceeding, something to set it in motion, and in addition to the order of compromise, because by the Plaintiffs being bought out the action was at an end. That conclusion seems to me to be in entire accordance with what is said by Lord *Herschell* in the case of *Concha* v. *Concha* (1), where he put it, if I may say so, in an extremely strong manner by saying, in effect, "This point in the judgment of the Probate Court was not open to appeal because it was not essential to the decision; then how can it be said that it was a matter which bound the parties?" The point now under consideration was not brought to the mind of the Court at that time. It might have been brought to the mind of the Court; but if it had been brought to the mind of the Court it would not have stood for a moment in the way of the order for a compromise which was made, and it could not have affected that order, and I do not think that the present Plaintiffs are in the slightest degree debarred from raising the question now because it was not brought to the attention of the Court either by them or the trustees who, at least, were as much concerned in having the question raised and disposed of. The other cases cited on this point do not seem to me to have much direct bearing on it. In *Askew* v. *Woodhead* (2) a somewhat litigious plaintiff having got liberty to attend the proceedings in one action, in which he could raise and have disposed of the question which he raised in another, was anxious to continue this action also, and, of course, there the Court stopped him from so doing. In *Serrao* v. *Noel* (3) the only question was whether a man might, as Mr. *Warmington* has described it, split his relief, and having a right to an injunction and damages in respect of the same cause of action, first bring an action for the injunction, and then afterwards for damages; and the only point discussed in the judgment was whether the Court before whom the injunction came was competent to award damages; and, as the Court came to the conclusion that that might have been done, it followed that it ought to have been done, and so the second action could not be allowed. It seems to me, therefore, whether it is regarded as *res judicata*, whether it is called estoppel, whether it is called a release to the trustees, the Defendants fail to make out that what was done in the former action is any bar to the relief sought by the Plaintiffs in this action. The point was never brought up for adjudication; there was no inadvertence, or mistake, or even accident, in not calling the attention of the Court to it, when that order for compromise was made, because it was entirely outside the compromise. The compromise really was not as between the trustees and the present Plaintiffs, but as between the Plaintiffs to that action and the other parties interested in the trust funds. As between them it was said, "It is better to pay the Plaintiffs out, let them take a lump sum, which may be fairly estimated as what they will eventually be entitled to, let them go, and then the rest of the fund will belong to us." The trustees were, of course, parties to the order—the Court could not have made the order without their concurrence—but they were not parties to it in the sense of making the bargain—there was no bargain between them and the parties interested. They were only there to inform the Court and protect the fund; and I think it is impossible to say that now they can set up a release arising from a bargain which was really never made by them.

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(1) 11 App. Cas. 552.

(2) 21 W. R. 573.

(3) 15 Q. B. D. 549.

On both points I am in favour of the Plaintiffs, but I must say one word on the subject of costs. Although I cannot allow the trustees' defence of what they have done so as to relieve them from responsibility because they acted judiciously and did their best, still I observe from the recitals in the deed of 1884, and I conclude from what I have been told, that the trustees were in a position of extreme difficulty by reason of the embarrassment, possibly impending bankruptcy, of the mortgagor, and it may be that, though they did not do what the deed authorized, they did what was, under the circumstances, the best for the estate, and it may be that if they had come to the Court, the Court

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would have in some way or other sanctioned their doing exactly what they did, or something of that character. Their *bona fides* is not impeached. I do not think they can be said to have acted otherwise than as honest trustees, and I also think that, though it is necessary to have this point decided, the real point has not been brought against them quite so clearly as to make it incumbent on the Court to say that they ought to have acknowledged their mistake and submitted to judgment. Therefore, although in deciding against them I cannot give them their costs out of the estate, I see no reason to make them pay any costs.

Solicitors for Plaintiffs: *Crosse & Son.*
Solicitors for Defendants: *Lee & Pembertons.*

H. L. F.

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1889

Nov. 16.

In re OLIVER AND SCOTT'S ARBITRATION.

Procedure—Award—Motion to extend Time for setting aside—Jurisdiction— 9 *& 10 Will.* 3, *c.* 15, *s.* 2 [*Revised Ed. Statutes, vol. ii., p.* 71]*—Judicature Act,* 1873, *s.* 26 [*Revised Ed. Statutes, vol. xvii. p.* 79]*—Judicature Act,* 1875, *s.* 17 [*Revised Ed. Statutes, vol. xvii. p.* 742]*—Order* LXIV., *rr.* 7, 14.

Under rule 7 of Order LXIV. the Court now has jurisdiction, on good cause shewn, to extend the time for moving to set aside an award, although the time limited by 9 & 10 Will. 3, c. 15, s. 2, as enlarged by rule 14 of Order LXIV., may have expired.

BY deed dated the 1st of February, 1886, *R. Oliver* and *T. B. Scott* became partners in trade for fourteen years from the 28th of January, 1884; and the deed provided that, on the death of either partner, the surviving partner should be entitled to purchase the business by agreement between him and the executors of his late partner, and the value of what he had to buy was to be ascertained by arbitration.

On the 4th of June, 1888, *R. Oliver* died, having appointed *A. Oliver* and *J. B. Colton* his executors.

By agreement dated the 24th of July, 1888, and made between *A. Oliver* and *J. B. Colton* of the one part and *T. B. Scott* of the other part, *T. B. Oakshott* and *C. S. Beecroft* were appointed the arbitrators to ascertain the value of the capital and effects of the partnership and the goodwill thereof in manner provided by the partnership deed, and it was agreed that the submission to arbitration and any award thereunder might at the instance of either party be made a rule or order of any Division of the High Court of Justice.

On the 11th of August, 1888, the arbitrators made and published their award, and by order dated the 24th of October, 1889, it was ordered that the said agreement of the 24th of July, 1888, and the award thereunder be made an order of the Chancery Division of the High Court of Justice.

On the 2nd of November, 1889, the executors of *R. Oliver* served *T. B. Scott* with a notice of motion asking that notwithstanding the time limited had expired they might be at liberty to move to set aside the award of the 11th of August, 1888, on the ground of fraud on the part of *T. B. Scott.*

Warmington, Q.C., and *Astbury,* for the motion:—

We have to satisfy the Court, first, that there is a good case for extending the time; and, secondly, that we are not unreasonable in coming in November, 1889.

Henn Collins, Q.C., and *A. G. Roby,* for *T. B. Scott*:—

There is a preliminary point. We say that the Court has no power or discretion at all to extend the time.

Warmington:—

The motion is based on Order LXIV., rule 7, which empowers the Court to enlarge or abridge the time appointed by the rules for doing any act; and then rule 14 of the same order provides that an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties. Under 9 & 10 Will. 3, c. 15, s. 2, an application to set aside an award must be made in the "term" next after the award has been published. But by sect. 26 of the *Judicature Act,* 1873, terms were abolished except as a measure for determining the time within which anything had to be done until "provision is otherwise made by lawful authority." Then sect. 17 of the *Judicature Act*, 1875, empowered the Judges to make Rules relating to the practice and procedure of the Court. This is a matter relating to the practice and procedure of the Court, and the Rules that have been read are made expressly by lawful authority. The cases are collected in *Russell* on Awards (1). We are also entitled to move on the ground of fraud: *Rogers* v. *Hadley* (2).

Henn Collins:—

The cases cited are cases of reference at Common Law, where a totally different jurisdiction existed. This is not an arbitration at Common Law at all. It is not an arbitration in an action or under the *Common Law Procedure Act*; but it is an arbitration under a particular statute which limits a certain time, and, unless that statutory enactment has been repealed by some other statute, the power to hear an application to set aside an award after the time has expired does not exist. No statute has repealed this enactment. All that the Judicature Acts and Rules have done has been to substitute the new "Sittings" for the old "Term" in the Act of *William* III., so that the matter stands now as it stood before those Acts and Rules, and the length of time within which the application is to be made alone is altered; and although the Courts have always had, independently of any specific rule, an inherent power of enlarging time where application has been made after the time limited, yet it has always been held that applications to deal with awards after the time prescribed by the statute of *William* III. could not be entertained: *In re North British Railway Company and Trowsdale* (3); *Moore* v. *Darley* (4); *In re Corporation of Huddersfield and Jacomb* (5); *Auriol* v. *Smith* (6); *Dawson* v. *Sadler* (7); *Heming* v. *Swinnerton* (8). Therefore, unless it can be said that the Judicature Rules were passed with the intention of not merely modifying the practice and procedure, but of repealing the specific enactment contained in the statute of *William* III., the Court has no jurisdiction to deal with the present application.

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(1) 6th Ed. p. 664 *et seq.*
(2) 32 L. J. (Ex.) 241, 248.
(3) Law Rep. 1 C. P. 401.
(4) 1 C. B. 445.
(5) Law Rep. 17 Eq. 476, 484.
(6) T. & R. 126.
(7) 1 S. & S. 537, 540.
(8) 2 Ph. 79.

KEKEWICH, J.:—

I have no doubt about this point. I shall certainly not hold that this Act of Parliament, which limits the time, could be altered otherwise than by the authority which made the enactment, that is to say, by the Legislature itself. The Act of Parliament says that any motion to set aside an award must be made in a certain Court, and must be made in the term next after the award has been made and published to the parties; and that applies to this particular award made under that Act. Unless I can find that that has been altered by Act of Parliament I should have no hesitation in saying, on this part of the case, that the Court has no jurisdiction to set aside the award, the term next after the publication of the award having, as admitted on all hands, expired. But since that Act was passed Terms have ceased to be operative for many purposes—in truth they are now observed only for certain purposes outside the Courts of Justice. They have been abolished, because they have been fused into the "Sittings." We in the Court of Chancery were familiar with both. We sometimes had Sittings before Term and sometimes Sittings after Term, and the year was made up quite as much of Sittings out of Term as of Sittings in Term. They were known as "Sittings," but that, of course, did not alter the Act. When the *Judicature Act* came in this anomaly of certain business being done in Term time, the Term having ceased to have the importance which it had before, was noticed and provided for, and by the 26th section of the *Judicature Act*, 1873, Terms were abolished, but they were to continue to be regarded, where they had to be regarded as a measure of time, "unless and until provision is otherwise made by any lawful authority." Now, before proceeding to discuss what authority was necessary, I wish to refer to the case of *In re Governors of the College of Christ, Brecknock and Martin* (1). There the application was made out of time according to the provisions of the Act of *William* III., no alteration having been made by any lawful authority, and Lord Chief Justice *Cockburn*, with the concurrence of three other members of the Court of Appeal, held that, there having been no provision made by lawful authority, it was then bound by the Act of *William* III.;

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(1) 3 Q. B. D. 16.

and that, hard as it might be, nothing could be done, and he pointed this out. He said, "This may lead to considerable conflict between the two modes of reckoning 'Terms' and 'Sittings,' and I hope something may be done to prevent hardship to suitors." The consequence was that a little later these Rules were made which are called in question here—Order LXIV., rules 7 and 14—and they make certainly an entirely different provision. I think rule 14 ought to be read first. "Application to set aside an award may be made at any time before the last day of the Sittings next after such an award has been made and published to the parties." That was really only putting into the form of a rule, with the word "Sittings" substituted for "Term," what was in the Act of Parliament. That alteration of "Term" into "Sittings" is admittedly within the powers of the Judges who have to make the Rules. Then rule 7 gives the Court or a Judge power "to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require." Really, the question is, whether that was within the power of the Rule Committee who made the Rules. For that purpose I must turn to sect. 17 of the *Judicature Act*, 1875, which provides that any rules may be made "relating to the practice and procedure of the Court." Is this a matter of practice and procedure? It seems to me that the time within which an application may be made is necessarily procedure. In truth, certainly a large majority of the applications which are made to the Court, and which, because of their dilatory character, are often advanced, and are called procedure summonses or procedure applications, relate to the time within which a certain thing has to be done. Therefore, that seems to me to be clearly procedure. Then it is said that though the Rule Committee might alter the time in this sense, substituting "Sittings" for "Term," they cannot extend the Sittings. I fail to comprehend that argument. That they might have shortened it, seems to me perfectly clear. They might have said, "the Sittings are very long and the Term is very short. The Sittings are rather more than justice requires for setting aside an award, and, therefore, we will say only a certain portion of the Sittings;" and the rule might have said, "in the first three weeks of the Sittings," or "in the first half of the Sittings," or in any other way might have fixed the time, being less than the whole of the Sittings. And if they could make it less than the Sittings, why not more, and why not in the next two or three Sittings? I find it difficult to follow the argument that the Rule Committee can only substitute "Sittings" for "Term," when necessarily the Sittings and Term are not commensurate. I fail to see how one must be substituted for the other, *simpliciter*, without any other alteration. I think the Judges could have said, "in the next Sittings or any enlargement thereof," or "any Sittings or any time to which the business of those Sittings may be postponed." We in this Chancery Division are in the habit of rising on the last day of the Sittings; the Queen's Bench Judges are often detained on circuit and do work some days after the Sittings. It would have been very easy to have said, "so long as the circuits continue," or any other arrangement of that kind. Instead of that, what they have done is this: they have said the Sittings shall be substituted for the Term, with a proviso that, if the Court before which the matter comes sees fit to enlarge that time, then that shall be done on such terms as justice requires. I think that, given the power to alter the Act of Parliament at all, which is not and cannot be denied, there was power to alter it in the manner which has been done. Therefore, I am of opinion that it is now competent for me to consider whether the justice of the case requires that, on terms which are within my judicial discretion, the enlargement for which the applicant asks shall be granted.

The motion was subsequently heard and decided on its merits.

Solicitors for Applicants: *Pritchard, Englefield, & Co.*, agents for *Boote & Edgar, Manchester.*

Solicitors for Respondent: *Bower, Cotton, & Bower*, agents for *Allen, Prestage, & Co., Manchester.*

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Nov. 21, 22, 23, 24; *Dec.* 2, 3.

DREYFUS *v.* PERUVIAN GUANO COMPANY.

[1880 D. 0192.]

Inquiry—Damages by Detention of Cargoes—Judgment varied, but Inquiry allowed to stand—Inquiry whether satisfied by giving nominal Damages—Principles to be adopted in working out Inquiry—Chief Clerk's Certificate —Variation of—Lord Cairns' Act (21 *&* 22 *Vict. c.* 27), *s.* 2 [*Revised Ed. Statutes, vol. xiii., p.* 268] *— Jurisdiction — Damages in substitution for Injunction—Threatened Injury—Possession taken under Order of Court.*

Lord Cairns' Act did not confer upon the Court of Chancery any jurisdiction to award damages in a case where no wrongful act had been committed by the person against whom an injunction was sought. Therefore where an action is brought for an injunction in respect of a threatened injury, and no actual wrong has been committed by the defendant, the Court has no jurisdiction to give damages in substitution for such injunction.

The Plaintiffs brought an action against the Defendants for delivery to the Plaintiffs of certain cargoes then at sea, to which they claimed to be entitled, for an injunction to prevent the Defendants from receiving them, and for damages for their detention. The Defendants by their pleadings claimed the right to receive the cargoes, and shewed that they intended to receive them. Shortly after the writ was issued an order was made by consent under which the Defendants received the cargoes, keeping accounts, and abiding by any order of the Court as to the proceeds. At the time when this order was made only two of the cargoes had arrived in this country. At the hearing the Judge held that the conduct of the Defendants amounted to an unlawful detention of the cargoes, and gave judgment for the Plaintiffs with an inquiry what damages had been sustained by them by reason of the detention of the cargoes by the Defendants. The Defendants appealed against the whole of this judgment, but subsequently abandoned their appeal against the portion containing the inquiry, and claimed to be entitled to reimbursement for expenses incurred by them in respect of the cargoes received under the consent order. The appeal was dismissed, and the Defendants appealed to the House of Lords, who varied the judgment by allowing the claim to expenses, but affirmed it in other respects. No application was made to the House to vary or alter the terms of the inquiry, which accordingly remained as part of the judgment. The Chief Clerk made a certificate finding damages on the footing that there had been a detention of all the cargoes, commencing on their arrival in this country. The Defendants applied to vary the certificate, contending that the effect of the decision of the House of Lords was that there had been in fact no wrongful detention, and that nominal damages only ought to be given. *Kay*, J., refused to vary the certificate, and the Defendants appealed:—

Held, by *Cotton* and *Fry*, L.JJ., *Bowen*, L.J., dissenting, that the in-

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quiry in effect affirmed that there had been a wrongful detention of the cargoes in question giving rise to damages; that such an inquiry could not be satisfied by finding merely nominal damages, nor was it competent to the Court in working out such an inquiry, not reversed by any Court, to deprive it of all force and effect by reviewing the circumstances under which it was made; that the decision of the House of Lords had left the inquiry in force, and that no reasonable ground had been shewn for varying the certificate of the Chief Clerk:—

Held, by *Bowen*, L.J., that the effect of the decision of the House of Lords was that no act of possession under the consent order was wrongful, or gave any right to damages; that the Court had no jurisdiction to give damages in a case where a wrongful act had not been committed, but only threatened; that the Chief Clerk was not precluded by the terms of the inquiry from finding that there were nominal damages only; that as he had made no distinction between the cargoes, but had apparently proceeded upon the view that taking possession under the consent order was itself an act of detention from which damages would flow, his certificate was wrong; and that the matter ought to be referred back to him in order that he might state what were the wrongful act or acts of detention in respect of which he found damages, and what damages he found in respect of them.

THIS was an appeal from a decision of Mr. Justice *Kay* (1), refusing an application by the Defendants to vary the Chief Clerk's certificate made in the action. The facts of the case were as follows:—

On the 7th of June, 1876, the Peruvian Government entered into a contract (known as the *Raphael* contract) with the Defendant company to consign to them for sale eleven cargoes of guano in respect of which the company were to receive £4 15*s*. a ton, for freight and other expenses, and the rest of the proceeds were to be for account of the Government, to whom the company were to make certain advances against the cargoes. The eleven cargoes were shipped at *Lobos* on the coast of *Peru* about December, 1879.

Disputes arose between the Government and the company as to whether the cargoes were within the contract; and the result of such disputes was that the Government purported to determine the right of the company under the contract, and sent the bills of lading of the cargoes to the Plaintiffs, Messrs. *Dreyfus*. The company, however, claimed possession of the cargoes, and, with regard to four of the ships, gave directions at the port of call to the masters as to the ports at which they were to discharge.

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(1) 42 Ch. D. 66.

On the 27th of April, 1880, the writ in this action was issued by Messrs. *Dreyfus* against the company and the masters of the ships, claiming delivery of the cargoes to the Plaintiffs, and an injunction to prevent the company from receiving them.

At this time two of the cargoes had arrived, and apparently (though the evidence on the matter was not very clear) possession of them, either actual or constructive, had been taken by the Defendants; but the other nine cargoes were still at sea.

The Plaintiffs moved for an injunction and receiver, and on the 30th of April, 1880, an order was made on that motion, whereby, the company consenting, the action was dismissed against the masters of the eleven ships without costs; and the company undertaking that the receipt by them of the cargoes should be without prejudice to any question between the parties, and that they would keep separate accounts of expenditure and receipts in respect of the cargoes, and abide by any order the Court might make as to them or the proceeds of them, it was ordered that the costs of the motion should be costs in the action, and that the order should be without prejudice to any question in the action.

On the 16th of July, 1880, the statement of claim was delivered, claiming delivery to the Plaintiffs of the cargoes, damages for their detention, and an injunction against the receipt of them by the company.

By their pleadings the company in effect alleged that they had taken possession of the cargoes under the *Raphael* contract, and claimed to be entitled, under that contract, to receive, sell, and deal with the cargoes: they denied that such possession was wrongful, and denied the Plaintiffs' right to the property in the cargoes.

By an order of the 16th of September, 1880, the company were allowed to receive the cargo of one of the ships without prejudice to any question.

On the 17th of December, 1880, an order was made for the appointment of a receiver of all the eleven cargoes, or the proceeds of any sold, and on the 23rd of February, 1881, a receiver was appointed.

By an order of the 8th of March, 1881, the company were nevertheless permitted to sell the cargoes of two other ships, and to pay the gross proceeds to the receiver, and by another order of the 26th of February they were permitted to retain £6316 4s. received for cargo of another ship (which had been sold out of Court) on account of expenses, which were to be paid to them without prejudice to any question.

On the 13th of January, 1885, Vice-Chancellor *Bacon* gave judgment in the action, declaring the Plaintiffs entitled to the cargoes, and that the company were not entitled to be reimbursed any expenses incurred by them in respect of any of the cargoes, except under the order of the 8th of March, 1881, and the judgment directed an inquiry "what damages have been sustained by the Plaintiffs by reason of the detention by the Defendant company of the cargoes of guano in question in this action."

The company appealed against this judgment, but on the hearing of the appeal abandoned it except as to their claim to be paid £4 15s. per ton under the *Raphael* contract, or, in the alternative, to be allowed the freight and landing charges paid by them in respect of the cargoes which they had received under the order of the 30th of April, 1880. On the 12th of February, 1887, the Court of Appeal dismissed the appeal, and affirmed the judgment of the Vice-Chancellor.

The company appealed to the House of Lords, and on the 18th of July, 1887, the House of Lords varied the judgment by allowing to the company the freight and landing charges so far as the same had not been already repaid to them or allowed to them in account with the Peruvian Government, but affirmed the judgment in other respects, Lord *Watson*, who occupied the woolsack, stating that he thought that under the circumstances the actual receipt of the cargoes by the company must at least be regarded as a neutral, and not an adverse, act of possession. The counsel for the parties were invited by the House to make any suggestions for varying the terms of the judgment, but no such suggestions were made, and the inquiry directed by the Vice-Chancellor accordingly remained as part of the judgment.

On the 12th of March, 1889, the Chief Clerk made his certificate, finding that the detention of the eleven cargoes commenced on the arrival of such cargoes respectively in *England*, and that the damages for such detention were as follows:—£2148 13*s.* 2*d.*, diminution of gross proceeds owing to sale by receiver instead of Plaintiffs; £351 6*s.* 10*d.*, increased expenses of sale under Orders of Court; £26,757 2*s.*, damages for loss of interest on those sums, and on actual proceeds of the cargoes computed at 5 per cent. till judgment, less interest gained in Court, and paid by receiver; £4854 6*s.* 9*d.*, damages for non-payment of these moneys at 4 per cent. from judgment to the date of the certificate.

The company took out a summons asking that the certificate might be discharged, and the inquiry proceeded with on the footing that the Plaintiffs were entitled to no damages, or that the certificate might be varied by finding that no detention took place, or that if any detention took place it occurred at *Lobos*, and lastly by striking out the whole of the sum found, and by finding that the Plaintiffs had sustained no damages.

Mr. Justice *Kay* refused the application, and the Defendants now appealed.

Previously to the hearing of this appeal the Defendants applied by motion to the Court of Appeal, for liberty to appeal from the portion of the judgment of the Vice-Chancellor which directed the above inquiry, but their Lordships (*Cotton*, *Bowen*, and *Fry*, L.JJ.), on the 21st of November unanimously refused the motion, being of opinion that, after the proceedings before the House of Lords, it was not competent to the Court to accede to it.

The present appeal was then heard.

Sir *R. E. Webster*, A.G., *Rigby*, Q.C., and *Haldane*, for the Appellants:—

There has never in this case been any detinue properly so called. There has been merely a *bonâ fide* assertion of right, and neither in law nor in principle does a statement by a man that he intends to assert a right amount to detention for which damages can be given.

It is clear that previously to the order of the 30th of April, 1880, there had been no act—at any rate with respect to the nine cargoes—which could amount to detention. By that order the cargoes were placed *in medio* by the consent and for the convenience of both parties, and the Defendants, for the benefit of the Plaintiffs as much as for their own, took the management of the property and were responsible for it, and instead of holding the cargoes and spending the proceeds and being liable in damages, they had to pay the money into Court and account for their receipts.

The House of Lords has decided that after the date of that order there was no wrongful possession, but that the possession taken was either with the consent of the Plaintiffs or at least neutral, the Defendants receiving the cargoes upon the terms that that receipt was to be without prejudice to any question in the action. The effect of the judgment of the Vice-Chancellor had been that everything which the Defendants did after the 30th of April, 1880, was wrongful; that therefore all their expenditure was the expenditure of wrongdoers, and even although it had saved the property of the Plaintiffs, the Defendants were not entitled to any reimbursement in respect of it. But the House of Lords have in effect reversed this conclusion, and it is inconsistent with their decision that any substantial damages for detention should be given. Indeed it is not consistent with that decision that there should be an inquiry as to damages at all, but the attention of the House was not called to that point.

The inquiry directed by the Vice-Chancellor was as to damages sustained by reason of the "detention" of the cargoes. "Detention" cannot mean "neutral possession," and the effect of the decision of the House of Lords is that there has been no detention. It has been said that the inquiry assumes detention, for that otherwise the words "if any" would have been inserted. But it cannot be contended that under an inquiry as to damages the Chief Clerk is bound to find substantial damages, when in fact there are only nominal damages, merely because the words "if any" are left out.

The inquiry no doubt exists and must be submitted to, but it ought not to be worked out on an assumed state of things, but on the actual state of things as ascertained by the judgment of the House of Lords.

[FRY, L.J.:—It would be an impertinence on our part to rob of all meaning an inquiry directed by the House of Lords.]

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If the inquiry makes it necessary that some damages should be given, we say that the standard of damages which has been adopted is wrong. No *bonâ fide* claim of right gives a cause of action to the party against whom it is made: *Wren* v. *Weild* (1); *Quartz Hill Consolidated Gold Mining Company* v. *Eyre* (2). In the present case the decision of *Williams* v. *Peel River Land and Mineral Company* (3) has been applied to detention under entirely different circumstances. Damages cannot be given for detention under an order made in a suit. The judgment of Mr. Justice *Kay* rests on a fallacy. The case is not like one where possession is wrongfully taken, it is one where the goods were lawfully in the possession of the Defendants and were detained under a *bonâ fide* claim of right. There is nothing in the judgment which fixes us with detention for any particular period. Suppose we had detained each cargo for twenty-four hours only, that would have supported this inquiry—the insertion of which only estops us from saying that there has been no detention at all. The Judge may have directed the inquiry being of opinion that there had been a lengthened detention entitling the Plaintiffs to substantial damages, but that would not enable us to appeal from it; we cannot appeal against a Judge's reasons, *Attorney-General* v. *Tomline* (4). The Chief Clerk has not inquired from what period detention began; he has inferred from expressions used by the Judge that detention began as to each cargo as soon as it arrived in *England*. There is no case to be found supporting the view that a plaintiff can obtain the appointment of a receiver and claim damages for detention of the property while it is in the possession of the receiver. *Lord Cairns' Act* (21 & 22 Vict. c. 27) was an Act to improve the procedure of the Court of Chancery by enabling that Court to give damages in certain cases, and no doubt gave the Court of Chancery jurisdiction as matter of procedure to award damages where a court of law could not have given them, *e.g.*, damages which accrued after the commencement of the action: *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (5), and the jurisdiction so originally given to the Court

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(1) Law Rep. 4 Q. B. 730, 734.
(2) 11 Q. B. D. 674.
(3) 55 L. T. (N.S.) 689.
(4) 15 Ch. D. 150.
(5) 23 Q. B. D. 294.

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of Chancery may now in an extended form be conferred on courts of law. But the Act did not create new rights, or enable the Court to award damages where no actual wrong had been committed; *Ferguson* v. *Wilson* (1).

The certificate is in any view clearly wrong in calculating interest from the time of the landing of the cargoes, upon the erroneous hypothesis that the cargoes could have been sold immediately.

Sir *Horace Davey*, Q.C., *Bigham*, Q.C., and *Ingle Joyce*, for the Plaintiffs, the Respondents:—

The Court is in effect asked to say that the Vice-Chancellor was wrong in directing this inquiry, and that the House of Lords were wrong in affirming this portion of his judgment. After two appeals we are still called upon to justify the grounds upon which the Vice-Chancellor thought that this inquiry was the mere corollary of his judgment.

The simple duty of the Chief Clerk was to ascertain the quantum of damages under this inquiry, referred to him by the Vice-Chancellor *Bacon*, and left undisturbed by this Court, and by the House of Lords. The scope and object of the inquiry were clear. The Plaintiffs had been kept out of possession of the eleven cargoes, which were their property, by the wrongful acts of the Defendants. The fact that loss had been occasioned was not disputed; all the Chief Clerk had to do was to ascertain the amount of the loss. There could be no doubt as to the meaning of the term "detention." It referred to that detention which the Defendants maintained and justified by their pleadings. At this stage of the proceedings the Plaintiffs are not concerned to inquire whether this is or is not an action of detinue. It is sufficient to say that there was ample evidence before the Vice-Chancellor to justify the direction of this inquiry. It was proved that the Defendants had asserted their control over the cargoes by giving directions at the ports of call that the ships should be taken to ports of their own choosing.

The consent order of the 30th of April, 1880, was expressly made without prejudice to any question in the action, and one of such questions was that of damages. The order was consented to as a matter of convenience to prevent loss by forced sales, and because the Defendants were claiming possession as of right.

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(1) Law Rep. 2 Ch. 77, 80.

The decision of the House of Lords was solely with reference to the right of the Defendants to be recouped their disbursements, and did not in any way touch the question whether or not they were liable in damages. The judgment of the House did not pass *per incuriam*. The terms of it were carefully considered.

Under *Lord Cairns' Act* (21 & 22 Vict. c. 27), s. 2, the Vice-Chancellor had jurisdiction to give damages. In the days of Lord *Eldon* the Plaintiffs would have obtained a decree affirming their right to these cargoes at the time of bill filed, and a perpetual injunction to restrain the Defendants from interfering with them. In the meantime the cargoes might have rotted. *Lord Cairns' Act* was framed to remedy this mischief. Treating this as a *quia timet* action to restrain a threatened wrong we submit that *Lord Cairns' Act* is clearly applicable. The jurisdiction conferred on the Court of Chancery by that Act extended to cases in which damages would not be recoverable at law: *Eastwood* v. *Lever* (1).

[BOWEN, L.J.:—Do you assert that under *Lord Cairns' Act* damages could be given in a case where actual legal wrong had not been committed but only threatened?]

The jurisdiction to give damages was not dependent upon its being shewn that an action at law could be maintained. And although by arrangement of the parties or otherwise an injunction had become unnecessary, damages could be given; *Catton* v. *Wyld* (2), and see *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (3). Not only are the damages not confined to such as could have been given in an action at law, but they may be awarded on a different scale. If the Plaintiffs had obtained an *interim* injunction and then failed at the hearing to establish their right to the cargoes, they would have had to pay, under the usual undertaking, damages to the Defendants for keeping them out of possession by reason of the claim so wrongfully set up. This case is the converse of that, and why, therefore, should not the Defendants be held liable to pay damages to the Plaintiffs?

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(1) 4 D. J. & S. 114, 128.
(2) 32 Beav. 266.
(3) 23 Q. B. D. 294.

As to the subsidiary point taken as to the mode of calculation of interest it is enough to say that the point is not raised by the summons to vary, and was not taken in the Court below.

Rigby, in reply, referred to *Davenport* v. *Rylands* (1), *Fritz* v. *Hobson* (2), and *Cooper* v. *Cooper* (3).

COTTON, L.J.:—

This is an appeal from the decision of Mr. Justice *Kay* refusing to vary the Chief Clerk's certificate. [His Lordship stated the nature of the proceedings, and continued:—]

Under these circumstances, the Defendants have put us in the greatest difficulty. In my opinion we cannot inquire whether the portion of the judgment of the Vice-Chancellor *Bacon*, which is now in question—no longer his judgment, no longer our judgment, but the judgment of the House of Lords—is right or wrong. But as there was no actual possession of these cargoes, and therefore detention, in that sense, before the order of the 30th of April, 1880, it is necessary to ascertain what this inquiry can refer to.

I have not thought it right to go through the evidence in this case for the purpose of seeing whether the decision of the Vice-Chancellor was right or wrong, but that decision does assume, and in fact give directions founded only upon this, that there had been that which amounted to detention so as to justify the Plaintiffs in asking for and the Judge in awarding damages which had been sustained by reason of that detention.

It is, however, right to look at the pleadings, because they shew what was the case on which the Vice-Chancellor was deciding. [His Lordship referred to the pleadings, and continued:—]

Now, having regard to these pleadings, in my opinion what the Vice-Chancellor decided was, that the Defendant company had been guilty, not by setting up this claim in this action, but by their action in the matter, of such conduct as amounted to detention, thus preventing the Plaintiffs from getting, as they would otherwise have done under their bills of lading, possession of these cargoes. I do not at all enter into the question whether that was right or wrong. We are not at liberty, in my opinion, to discuss or enter into that question, because the Defendants have prevented us from doing so. They contended at the hearing that they had taken possession; they stated how it was that they got possession, and whether they were right or wrong, whether their counsel was right or wrong in that view or not, in my opinion we must take it that the view of the Vice-Chancellor was based upon that. And it must be remembered that this inquiry was directed after the judgment was delivered, and when the minutes which, as I gather from the shorthand writer's notes, had been prepared by the Plaintiffs' counsel, had been handed up, and the Vice-Chancellor requested the counsel then present for the Defendants to consider carefully whether the minutes were right, and whether the order which he was going to pronounce was right or not, and not one single word was said against this inquiry being directed.

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(1) Law Rep. 1 Eq. 302.

(2) 14 Ch. D. 542.

(3) 13 App. Cas. 88.

Well, therefore, here is the inquiry which embodies in fact a declaration that there had been a detention. It is founded on a decision of the Vice-Chancellor that there was a detention of which the Defendants had been guilty which justified him in holding them liable to damages. In my opinion (it may be very unfortunate) we are not in a position to inquire into that. Whether the House of Lords will think that it can do so, I give no opinion at all; but Lord Justice *Fry* suggested that the Appellants should go and see whether the House of Lords would think that was still open, having regard to what they had done when the appeal came before them; but, and I think reasonably, the Attorney-General declined to accept that offer, and desired the appeal to continue.

Then it is said that this finding as to damages is inconsistent altogether with the finding of the House of Lords when that appeal was before the House, and when it was decided that the Defendants appealing were entitled to such payments as they had made in consequence of the order of the 30th of April, 1880.

If it could be seen that in fact the decision of the House of Lords was at variance with any such finding, we should be put into a great difficulty by the action of the Defendants, but I do not think that is really the result of the decision. [His Lordship referred to the proceedings before the House of Lords, and continued:—]

I think we cannot say that this decision of the Vice-Chancellor *Bacon*, on which the certificate is founded, is at variance with the decision of the House of Lords. If it be so, the House of Lords when the matter comes before them will, if they think they have any power to do so, act upon it as justice may require.

Then the real argument against this certificate was that there was nothing in fact done which would justify the Court in granting to the Plaintiffs any damages for anything which can be called detention on the part of the Defendants. That is in fact to reverse the decision, and to strike out this inquiry which the Vice-Chancellor has directed, because, although it was said that that might be done by giving nominal damages, yet, as I put it to Mr. *Rigby*, I cannot understand how, if no act has been done by the Defendants which justifies any damages being given against them, even nominal damages could be given. If that course is taken it is assumed that an act has been committed which justifies a claim for damages, but that the damages are so small that the Court will not give substantial damages. Very likely juries in exercising their peculiar function do sometimes deal with a case in the way which has been mentioned, but it will not do for Mr. Justice *Kay*, or for this Court, to exercise that unknown equity which is sometimes exercised by juries, and, in my opinion, we cannot, unless there is some reasonable ground for differing from the finding of the Chief Clerk as to damages, in any way vary the certificate.

It was said that here the Chief Clerk and Mr. Justice *Kay* have put all the cargoes upon the same footing, and that interest was calculated from the time when the cargoes were landed. That, I think, was on this footing, that if the Defendants had not by their acts detained these cargoes, thus preventing the Plaintiffs from getting them without recourse to a Court of

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equity, then at that time the Plaintiffs would have got possession of the cargoes, and from that time it is that the interest is calculated; that is to say, as from the time when, but for the detention of the Defendants, the Plaintiffs would have got possession of these cargoes; I cannot see, therefore, that we can interfere there.

There was another point that was argued by Mr. *Rigby*, namely, that these cargoes could not all have been sold immediately. That really caused some doubt in my mind whether the certificate was quite correct in fixing a date as if they could be sold immediately. But that point was never raised at all, either in Chambers, so far as one can see, looking only to the evidence, or before Mr. Justice *Kay*, nor was it really raised by the summons to vary. Therefore, in my opinion, we should be wrong, even if *primâ facie* it seemed to us that the matter might have been differently treated both by the Chief Clerk in Chambers, and by Mr. Justice *Kay* when the matter was before him, when this point was not raised at all by the Defendants, to allow them now to have the matter sent back on a point which they had not raised, and which has only occurred to them at the last moment. In my opinion the appeal fails.

I should mention that *Cooper* v. *Cooper* (1) was referred to by Mr. *Rigby* as a decision of the House of Lords which would enable us and require us to act according to his contention here as regards this inquiry as to damages. But that was a different case. There the matter was before the House of Lords, and although there was a question whether the interlocutor of the Court of Session could be appealed from, yet the matter was before them, and they, taking a different view as to the law which ought to govern the case, and having the matter before them, were at liberty to act, and did act, upon that view so as to decide the case on the law really applicable to the case before them. But here we are in a very different position after the affirmation of the judgment of the Vice-Chancellor both on appeal to this Court, and on appeal from this Court to the House of Lords.

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(1) 13 App. Cas. 88.

BOWEN, L.J. :—

I regret that I am unable to take the same view as the Lord Justice. This unhappy case has got into a tangle which my Brother, the Lord Justice *Cotton*, thinks absolutely desperate, but which I think is capable, even at this eleventh hour, of still being remedied without there being applied to it so drastic a measure as that which destroyed the Gordian knot. To put it broadly, it seems to me that the conclusion at which the Lord Justice has arrived does not give adequate effect to the law as laid down in the judgment of the House of Lords, and I do not myself feel the same difficulty that he does in discovering a way in which due effect can be given to it.

Now the facts of this case I do not propose to discuss, except so far as they are uncontroverted. I will only mention a few of the uncontroverted facts in order to make the remainder of my reasoning intelligible. Eleven cargoes of guano started from *Lobos* for *England* in ships which were chartered at the risk and on account of the Peruvian Government by the company, the Defendants in this action. A quarrel took place on the other side of the seas, in consequence of which the Peruvian Government determined the right, so far as they could, and in law I think they did determine the right of the guano company to take delivery of these cargoes as agents for the Peruvian Government or otherwise upon the remainder of the ships, and they further transferred the title to the guano which was in themselves, and the right accordingly to take delivery, to the Plaintiffs in this action. The title of the Plaintiffs accrued while the ships were sailing across the seas. The ships arrived at intervals. Two of them, I will assume, were taken possession of, and wrongfully taken possession of, by the Defendants. I will assume that for the purposes of my judgment. The remainder were still on their way when a writ was issued to raise the real question between the parties, which was as to the right to take possession of the cargoes,—a writ which as regards the two ships which had already arrived might be based upon a wrong already done, and threatened to be continued, but which, with regard to the other ships which were still on the sea, for anything we know, was simply in the nature of a *quia timet* action to prevent a threat which had been expressed from being exercised. A few days after the writ an order was made in the action by consent in which it was agreed, obviously in the interests of both parties as they thought—for it is unimportant to consider whether the order has worked out to the detriment of one more than the other—that the receipt of the cargoes of guano by the Defendants should be without prejudice to any question between the parties, that they would keep separate accounts of expenditure and receipts in respect of the cargoes, and abide by any order which the Court should make with respect to the other cargoes.

Now, two things seem to me to be perfectly clear; the one, that eight or nine of the ships—I will call it nine for the purposes of my judgment, without investigating the question as to the number—were upon the high seas at the time when that order was made, and the cargoes were taken possession of by the Defendants under that order. The second thing that seems to me to be perfectly clear is that the *ratio decidendi* of the House of Lords in the case which went before them was that no wrongful act consisted in the taking possession of any cargoes under that order. It was necessary for the House of Lords so to decide. The point made was that the reimbursement of the freight which the Defendants claimed would be inequitable and unjust, as they were wrongdoers in respect of the taking of possession. The House of Lords said they were not wrongdoers in respect of the taking of possession, and that, therefore, the point made could not arise. I pause for one moment to observe that the House of Lords did not feel themselves hampered in coming to that conclusion as to the wrongful possession taken under the order, by the mere fact that an order for an inquiry had been made in the action, which was not appealed against, and which seemed to assume the detention of all the cargoes. Now these two things seem to me to be perfectly clear; first, the *ratio decidendi* of the House of Lords, and, secondly, that, as regards nine of the ships, if no other act were done in respect of them—and as far as we know nothing was done, though it will be seen presently I do not conclude that question—than the mere taking possession under that order, that was not wrongful.

Having said so much as to what seems to me to be clear I proceed to state wherein the difficulty now arises, and in order to explain that I must review shortly the course which this action took. The action when launched, as I have said, was, for anything that appears to the contrary on the facts before us, as regards several of the cargoes, a *quia timet* action. At the time when the action came to be tried, and, I think, at the time when the pleadings were delivered, the cargoes had been successively arriving. At the time when the action was tried they all had arrived, and had been taken possession of. In the pleadings, after the order of the 30th of April, 1880, it was useless for the Defendants to deny the mere fact of possession of the cargoes. They either had received them, or were going to receive them. The point they desired to make was that they had a right to receive them, and a title to the proceeds after the sale under a contract with the Peruvian Government. Now I do not myself see that the mere fact that on their pleadings, when the question was one of right, they allege that the possession which they had admitted they had of the cargoes was under a contract with the Peruvian Government, in any way prevents them setting up the fact that the possession was rightful, if that particular point under which they sought to justify it should fail. I think it was an alternative allegation which does not prevent them shewing that the Court had decided the truth. If it did, it seems to me it ought to have been an answer on the appeal to the House of Lords that they had admitted a wrongful possession, and had claimed a possession only in virtue of a contract which could not avail them, and that, therefore, there was a wrongful act or a detention. At the time when the Vice-Chancellor tried the action it appears to me (I do not hesitate to say it, because one can say it without disrespect to the eminent counsel who have conducted the case), that by an error in judgment, counsel did not address themselves to one of the real points in the action, which since has been seen, by the light of subsequent investigation, to be important, namely, whether there was any wrongful act at all in respect of nine at least of the cargoes. They admitted the possession, justifying it only upon their title. The Vice-Chancellor found that they were in possession. It was not disputed. He said it was admitted, and he ordered an inquiry as to damages upon that footing.

The matter came to this Court, and though the order as to damages was in form appealed from, it was not in fact, because that portion of the appeal was abandoned during the argument. From this Court they went to the House of Lords, and they still continued their policy of abandoning the appeal against that order for inquiry, and accordingly, in the event, the House of Lords did not disturb the portion of the judgment of Vice-Chancellor *Bacon* which they were not asked to disturb, and, nobody perceiving the importance of the lapse, this strange result has followed, that the House of Lords have declared that there was no wrongful act done in taking possession under the order of the 30th of April, 1880, but have left undisturbed an order for an inquiry which proceeds upon the footing that there was detention of all the cargoes, an order the maintenance of which can only be explained in one of two ways, either that it was an oversight, or that there were other possible acts of detention in respect of all the cargoes over and above the mere taking possession under the order of the 30th of April. But, as I said before, one thing is clear, that the House of Lords have declared that one class of acts done in respect of these ships was not a wrongful detention, namely, the taking possession under the order of the 30th of April, 1880.

Now the parties went back under this inquiry. The Chief Clerk in his certificate has, in my opinion, fallen into error. The vice of his certificate appears to me to be this, that although it is evident that it was necessary to discriminate between the various acts done with respect to these cargoes, because as to one class of acts the House of Lords has declared nothing to be wrongful in that particular, the Chief Clerk has lumped all the ships together, and assessed the damages upon a footing which leaves it open at all events to the view, and in my opinion necessitates the view, that he has as regards the whole of the ships treated as a wrongful act that very matter which the House of Lords said was not wrongful. The vice of the certificate is that it lumps the ships together. Can that be set right? Sir *Horace Davey*, in the first place protesting that he was not bound to argue the facts of the case, assumed for the purpose of his argument that there had been no tortious act in law at all; nevertheless, he said, there was nothing wrong in giving damages because *Lord Cairns' Act* clothed the Court of Chancery with the jurisdiction, where no wrong had been done in law at all, nevertheless, on a threat of injury which would give rise to the jurisdiction for injunction, to give damages in substitution for such injunction. I speak with perfect consciousness that I am only a proselyte at the gate in matters of equity, and what I have learned about it has been learned from wiser people than myself who sit with me, but I am still giving my opinion as I am entitled and bound to do. I am of opinion that the 2nd section of 20 & 21 Vict. c. 27, commonly called *Lord Cairns' Act*, did not clothe the Court of Chancery with such a jurisdiction. It is true the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon with which the Court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damages have arisen, and in a case where no damages have arisen in the ordinary sense of the term as known to lawyers, I am of opinion the Court has no power to give damages. I should be alarmed if that were my opinion only, but I believe I am justified in saying that my learned Brother, Lord Justice *Cotton*, agrees with me in that, and I will leave my other learned Brother to say whether he differs from me or not. But this I may say, as it was asserted by Sir *Horace Davey*—at least Sir *Horace Davey* seemed to put it forward as a proposition—that the practice in the Courts of Chancery had been in favour of his view, I have consulted others who are familiar with the practice among my colleagues, and I am told they are not aware of any such practice. I am specially informed by one who certainly can speak with authority on the point, that the view which I am now taking of this subject is the view taken by the late Master of the Rolls.

Sir *Horace Davey*, however, went further and put forward a moral justification of the view. He said that these Plaintiffs had been kept out of their property for many years, and that they ought to be compensated. The term "kept out of their property" seems to me to beg the question. If all that has been done is to threaten, and in consequence of a threat they have come to an arrangement that the cargoes shall be placed in the hands of the Defendants to do their best with them, that threat and that consent order, although it may have been detrimental to the interests of the Plaintiffs, is not a keeping out of possession which may give rise to damages under *Lord Cairns' Act*. The truth is that the expression begs the question. They were kept out of a great portion of their property by reason of entering into the order of the 30th of April, 1880, that is to say, they kept themselves out of it. I regret very much that they were driven by a wrongful threat into consenting to that order, but it does not enable any one to strain the law, and to find under the head of damages any acts which, as far as I know, there is no authority for treating as a source from which damages can flow.

But then, if *Lord Cairns' Act* does not apply, is there any wrongful Act which can be assigned as an explanation of the Vice-Chancellor's judgment? Sir *Horace Davey* protested against being compelled to discuss that question, and I do not propose to decide it because I do not consider that we have the materials on this appeal, or certainly they have not been brought to our attention in argument in a way that enables me to be quite certain on the point. One thing I do myself think, and that is that the Vice-Chancellor *Bacon* only proceeded, so far as I read his written judgment, upon the assumption that there had been a possession taken, and that that possession could not be justified, and he assumed that that made an act of detention, a view which is, as regards a certain number of the cargoes, invalidated in my mind in law by the judgment of the House of Lords. There was the carriage of the guano across the *Atlantic*. The title of the Plaintiffs began after it arrived, and the Defendants were merely charterers of the vessels. There were directions given at the ports of call. I can conceive directions given as to a port of discharge which might amount to acts of trespass, but we have not got the facts here before us to enable us to say what was done in respect of the indication at the port of discharge, if anything was done which could by any human imagination be construed as amounting to a wrongful act or an act of trespass. But I do not investigate the question as to what was done with respect to it, because I do not know that I can do so effectively. There may have been, and I believe there was with regard to one cargo, a wrongful act even after the order of the 30th of April was agreed to; and in respect of any wrongful sale after the order, I am not prepared to say that that might not be a source of damages under *Lord Cairns' Act* done before the inquiry as to damages; and it might be the extension—if it be an extension—of the principle laid down in the case of *Williams* v. *Peel River Land and Mineral Company* (1) and acted upon by my Brother the Lord Justice *Fry* in the case which was cited, of *Fritz* v. *Hobson* (2), and subsequently embodied, I believe, in an order under the *Judicature Act*, would apply to such a case. I leave that open. Finally there is the possession under the order of the 30th of April, 1880, but I will not assume for this purpose that even that order justifies everything that was done as regards all the cargoes. It would require me, before I came to that conclusion, to know exactly what was done with respect to the two which had been already landed, and whether it was possible, notwithstanding the expression of opinion of the House of Lords that for the purposes of freight all the cargoes were to be taken as being in the same boat, still to differentiate the case of those two cargoes in respect of the acts done before the order of the 30th of April, 1880. I leave that still open.

I come back to this, that although the history of these cargoes differs, that although, as regards a large number of them, it is obvious that the possession was taken under the consent order, and was not wrongful according to the view of the House of Lords, the Chief Clerk has made no distinction between any of those cargoes, has lumped them together, has possibly, I say probably or certainly, proceeded upon the view that the taking possession under the order was itself an act of detention from which damages would flow, and in that view, to my mind, his certificate is bad. His certificate states that he takes the damages from the arrival of the cargoes upon land. Now how far is it true that he was driven by this order of inquiry to go this length? That order of inquiry directs that there shall be an investigation as to what damages have flowed from the detention of the eleven ships.

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(1) 55 L. T. (N.S.) 689.

(2) 14 Ch. D. 542.

Sir *Horace Davey* suggested that if there had been no possible damages at all, the words "if any" ought to have been introduced after "damages"; and that the order ought to have run for an investigation as to the damages, if any, which flowed from the detention, if any, of the eleven cargoes. I think that is so. I think the stage at which this order was made indicates that the Court assumed that there would be damages in respect of these cargoes, but I draw the line there, and I protest that it does not follow from that that the Court declared that substantial damages must be given. No authority can be found for that proposition. It is untrue as regards the form of rules of inquiry with which I am acquainted. I will mention for example the case of bonds, and the inquiry directed by statute with regard to them, and also the form of a writ of inquiry under the *Judicature Act*, when a judgment is given by default. The Court, to my mind, does not find that there are substantial damages. What is true is, that the Court finds that there has been a wrong, and assumes that there may be substantial damages, not that there must be. It is for the Chief Clerk to inquire, it seems to me, and I cannot myself understand why a chief clerk would not be justified under such an order in finding there were nominal damages only in respect of one or more or all of these ships. Suppose for a moment the case of a single one of these ships; suppose it was clear to demonstration that one of these ships had been inserted in the order by a mere mistake, that there had been no detention at all of the ship, and that the ship, so far from being taken possession of by the Defendants, had been taken possession of by the Plaintiffs, had been sold by them, and they had appropriated the profits. Is the Chief Clerk positively bound to give more than nominal damages in such a case? He may be constrained by the form of the order to assume that there is a detention, but he may look to see what the detention is in order that he may know what damages flow from it. To my mind it would be extraordinary indeed if a chief clerk was bound to look to find damages without knowing what the acts of detention were in respect of which he found them. He must look to see what the detention is in order to know whether the damages are too remote, and I think that if it was clear that there had been no possible act of detention as to any one or more of these ships, I should feel myself no hesitation (but then, as I said before, I am only a proselyte at the gate) in saying that upon tender of nominal damages in such a case, and payment of nominal damages, all further proceedings on the inquiry might be stayed. But this is not really necessary from my point of view to decide. As I said, I consider the vice of the Chief Clerk's certificate is, that he has lumped all these ships together. I am ready to assume that there may be in the case of all the ships some other acts of detention than those which lie upon the surface in respect of what was done under the order of the 30th of April, 1880. There may have been something done in the indication at the port of discharge, and there may have been something done in respect of the ships taken possession of whose cargoes were landed, and there may have been something wrongfully done in respect of the cargoes that were landed under the order of the 30th of April, 1880. All that is for the Chief Clerk to state. As soon as it is seen that by lumping the ships together he has done injustice, he ought to be called upon to state, as he has acted upon this view hitherto, what are the acts of detention in respect of each of these ships on which he relies, and what are the damages which he assesses in respect of them.

To my mind, therefore, the right way of dealing with this case is to declare in accordance with the opinion of the House of Lords that no act of possession merely taken under the order of the 30th of April is a wrongful act or gives right to any damages at all; refer back to the Chief Clerk to state with regard to these eleven ships what are the wrongful act or acts of detention in respect of which he finds damages, and what damages he finds in respect of them.

I ought to say that that form of reference, if it was followed by the Court, would leave it open to the Chief Clerk, as I understand it and as I intend it, to rectify the error into which he seems to have fallen (for no argument was addressed to us by Sir *Horace Davey* to prove that he had not fallen into it) as to the calculation of the dates from which the interest should run.

There is a difficulty about costs. The costs of the inquiry are reserved. I think the costs of the appeal in this case ought to be borne by the Respondents. As to the costs in the court below, in consequence of the tangle in which the case has been involved, I should make no order, but should leave either party to bear those.

FRY, L.J.:—

In my judgment the course pursued by the Appellants has placed the Court in a cruel difficulty, and I have never felt myself so much embarrassed as I have in this case. It appears to me that, whatever course this Court takes, there is a danger that we are acting in some way at variance with the decision of the House of Lords.

If we take one course, we seem to me to be going counter to the expressed opinion of the learned Lords. If we take the other, we seem to me to be reversing a portion of the decree which the House of Lords has thought fit to affirm.

I will consider the case in the first place independently of the recent decision of the House of Lords, and I shall imagine myself to be filling the chair filled by Mr. Justice *Kay*, as successor to Vice-Chancellor *Bacon*, and as working out the judgment which the Vice-Chancellor pronounced. Of course, when the same Judge works out the decree which he himself has pronounced, he probably knows without difficulty the meaning of that decree; but if I were the successor of the Judge who made the decree, the first inquiry I should address to myself would be, What is the meaning of the inquiry under which I am now proceeding? and I should hold myself precluded from considering the propriety of that inquiry, or from in any way attempting to evacuate that inquiry of its true and real meaning, or from in any way reviewing or reversing the decision of the learned Judge who directed the inquiry.

Now, what is the inquiry in the present case? It is couched in these terms: "An inquiry what damages have been sustained by the Plaintiffs by reason of the detention by the Defendant company of the cargoes of guano in question in this action." We know that the cargoes in question in the action were the eleven cargoes, and the inquiry, therefore, seems to me to affirm, and judicially to determine, certain things. It determines that there has been a detention by the Defendant company of the eleven cargoes in question. It determines that that detention has been unlawful because it gives rise to damages, and it determines that those damages were substantial because in order to sustain such an inquiry it is requisite that the damages should be substantial. From any investigation of the rightness of that decision I should feel myself precluded when working it out, and the only question open would seem to me to be, what is the quantum of damages?

But then, outside of that, I must know and inquire what is the meaning of the detention of the eleven cargoes by the Defendant company so affirmed by the Vice-Chancellor in his judgment, and endeavour to ascertain the meaning of these words so used in the judgment by a reference to the pleadings, and also, if necessary, to the evidence and the presentation of the cases of both sides before the Vice-Chancellor. [His Lordship referred to the pleadings, and continued:—] It appears to me that the case made by the Defendants was shortly this: "We are in possession of the eleven cargoes, and our possession is rightful under the contract and the bills of lading." The Plaintiffs, on the other hand, say, "You are in possession, and your possession is wrongful, because the property is in us." And, in that state of things, it appears to me that the Vice-Chancellor—whether rightly or wrongly I do not feel myself at liberty to inquire—determined that there was a detention of the eleven cargoes by the Defendants, and that that detention was not only wrongful but gave rise to damages. No doubt it is quite true of several of the cargoes, that the greater portion of them was received after the order of the 30th of April, 1880, but the view which the Vice-Chancellor appears to me to have entertained with regard to that order was this, that the Defendants, by their wrongful acts on the 22nd, 26th, and, I think, the 29th of April, several of which preceded the commencement of the action, had driven the Plaintiffs into equity, and that the order of the 30th of April, 1880, was the natural result of the wrongful acts of the Defendants. That, I think, is the meaning of the Vice-Chancellor's affirmation of the detention of the eleven cargoes which, he says, gave rise to a claim of damages on the part of the Plaintiffs against the Defendants.

Now, if the matter had stood merely on the judgment of the Vice-Chancellor and upon the affirmation of it by this Court, I should have felt little or no difficulty in the matter. But the matter went to the House of Lords, not upon appeal against that part of the judgment—because that was abandoned in this Court—but against the decision of this Court on the main question in the action, and also with regard to the expenses incurred in the landing and freight; and, in dealing with that latter question, namely, the freight and landing charges, the learned Lords expressed their opinions in a way which I confess seems to me to be not consistent with the view of the Vice-Chancellor, and, therefore, great embarrassment is caused in acting on that view.

But then, what did the learned Lords do? It appears from the shorthand writer's notes that the learned Lord who presided on that occasion wrote down the order of the House, which he proposed that the House should pronounce, and that, having dealt with the two specific matters before the House, namely, what I may call the general question of title, and the question of the freight and landing charges, he then dealt with the rest of the order of the Vice-Chancellor, and, as to that, affirmed the order of the Vice-Chancellor. Now, there was hardly anything left in the order except this inquiry as to damages. It was by far the most important of the residual portions of the order, and that inquiry as to damages, involving the affirmation of the detention of the whole eleven cargoes, and the damages resulting from it, the House of Lords thought fit to affirm. Knowing the care with which the business of that House is conducted, and the care with which we see this particular case was conducted by the learned Lords—because not only did Lord *Watson* write down the order he proposed to make, not only did he read it, but he invited the attention of the learned counsel to it, and gave them an opportuuity of making any observations upon it—I say, having regard to that, I cannot believe that the affirmation of that inquiry, involving all that it does, was made *per incuriam* by the

House. And therefore I am driven to conclude that my own view, that the opinion of the learned Lords tended to evacuate that inquiry and to deny the detention, cannot be the accurate one.

It appears to me, therefore, that inasmuch as the House of Lords have reaffirmed the necessity of the inquiry, and that I can give no meaning to the detention, if the view which is suggested to have been taken by the House of Lords is the true one, I am bound to follow out this inquiry in the spirit and meaning in which it was directed by the Vice-Chancellor. It does not appear to me that it is competent, in working out an inquiry of that description, not reversed by any Court, to deprive it of all meaning by reviewing the circumstances under which it was made. And therefore I am not able to follow the view taken by my Brother Lord Justice *Bowen*, who, reviewing all the circumstances, comes to the conclusion that we ought to treat it as an idle inquiry, and to deprive it, as it seems to me, of any force and meaning. It is quite true that he has suggested that there may have been some detention ultra and beyond that which was in evidence before the Vice-Chancellor, but it appears to me that the history of these cargoes had been threshed out by the time this matter was before the House of Lords.

It is impossible to conceive that anything more can be known about them. The whole case was before the House of Lords when they affirmed this inquiry, and, therefore, I do not see my way to suppose that it is possible that there was any other construction to be put upon it, or that the House of Lords thought the inquiry to relate to any other detention which was not in issue nor in evidence, and which was really not the subject of consideration.

That being so, I think we are bound to proceed as if the matter was in the first instance before the Vice-Chancellor. Now what do I find that the appeal before us is? It is not an appeal directed to any particular cargo. It is not an appeal directed to any particular part of the inquiry, but it goes to the whole matter, and seeks to deprive the whole inquiry of any value. [His Lordship referred to the terms of the summons to vary the certificate, and continued:—]

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That being so, I do not feel myself at liberty to condescend upon the details of the particular detentions of the particular cargoes in the way in which my learned Brother thinks it open to him to do. I abstain from doing so because I confess I am greatly apprehensive of two things. I am apprehensive of there being no finality in litigation if upon an inquiry the whole matter is to be gone into again. And, further, I am apprehensive that, if we entertain objections of which due notice has not been given by the summons, we shall often be led *per incuriam* into doing what would seem to us to be justice, but would really be injustice. I therefore feel constrained, though extremely embarrassed as to what is the true course to take, to concur in the view of the Lord Justice *Cotton*, and think that this appeal must fail with the usual results.

I have only one other observation to add. I entirely agree with what has been said by Lord Justice *Bowen* on the subject of *Lord Cairns' Act.* I am clear that the statute often enables the Court, where a wrong has been done, to give damages upon a different scale from what was done by the Courts of Common Law, because it may give them in substitution for an injunction; but where there has been no wrong done it appears to me that *Lord Cairns' Act* confers no power to give damages.

COTTON, L.J.:—

I agree with what has been said by Lord Justice *Fry* as regards *Lord Cairns' Act.* I did not advert to it because I did not think it a matter which arose, taking my view of the case before us.

Solicitors for the Appellants: *C. & S. Harrison & Co.*
Solicitor for the Respondents: *G. M. Clements.*

C. C. M. D.

STUART *v.* DIPLOCK.

[1888 S. 1286.]

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KEKEWICH, J.

May 23.

C. A.

Dec. 10, 11.

Covenant not to carry on particular Trade—Carrying on Part of Trade.

By a lease of a house, No. 10, the lessors covenanted not to permit or suffer to be carried on at 11 or 12 the business of ladies' outfitting, nor give their consent to its being carried on at No. 9. Afterwards the assigns of the lessors demised No. 9 to the Defendants, who covenanted not to carry on there the business of ladies' underclothing, except vests and stockings. The Defendants when they took their lease had notice of the covenant in the lease of No. 10. The lessee of No. 10 sued for an injunction to restrain the Defendants from carrying on at No. 9 the business of ladies' outfitting. All that was proved was, that the Defendants, who were hosiers, sold four classes of articles, the sale of which was an essential part of the business of ladies' outfitters, but which were also commonly sold by hosiers:—

Held, by *Kekewich*, J., that as the sale of these articles was an essential part of the business of a ladies' outfitter, the Plaintiff was entitled to an injunction:

Held, by the Court of Appeal, that, assuming the lessees of No. 9 to be under an obligation which the Plaintiff could enforce against them by action, not to carry on the business of ladies' outfitters, the action must be dismissed, on the ground that they were not shewn to have done so, for that the *bonâ fide* sale by hosiers, along with numerous other articles, of certain articles of hosiery, the sale of which was an essential and important part, but not nearly the whole, of ladies' outfitting, was no breach of the obligation, there being no covenant that the lessees of No. 9 would not carry on any part of the business of ladies' outfitters.

Feilden v. *Slater* (1) distinguished.

Whether the lessees of No. 9 were under any obligation not to carry on the business of ladies' outfitters on which the lessee of No. 10 could sue them, *quære*.

By lease dated the 19th of June, 1879, *Willicombe & Oakley*, who were entitled for a long term of years to houses known as Nos. 9, 10, 11, 12, *Mount Pleasant, Tunbridge Wells*, demised No. 10 to *Stuart* for twenty-one years. The lease contained a covenant by the lessors "that they will not permit or suffer to be carried on in or upon the adjoining dwelling-houses and shops known as Nos. 11 and 12, *Mount Pleasant*, the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen, nor give their consent to such trades or businesses being carried on at or upon the shop numbered 9, *Mount Pleasant*, now occupied by Mr. *Kempson* as a wine merchant."

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(1) Law Rep. 7 Eq. 523.

The Plaintiff was the widow and the executrix and sole legatee of *Stuart*, and she carried on the above businesses at the house and shop No. 10.

After the date of the above lease, *Willicombe & Oakley* assigned all four houses to *Andrews & Stone*, subject as regards No. 10 to the above lease.

In September, 1885, the Defendants agreed for a tenancy of No. 9 for three years, and entered into possession. Afterwards by indenture dated the 3rd of March, 1888, *Andrews & Stone* demised it for twenty-one years to the Defendants, who were described as "fancy drapers and hosiers." The lessees covenanted with the lessors that the lessees, their executors, administrators, and assigns, "will not carry on or permit or suffer to be carried on at or upon the said shop and premises the trades or businesses of ladies' underclothing (except vests and stockings, which the trade term 'hosiery' includes), juvenile outfitting (except vests and stockings), or sale of baby linen, being the business carried on at the adjoining shop by Mr. *Stuart*."

The Defendants when they agreed for their lease had notice of the covenant in the lease of the 19th of June, 1879.

Mrs. *Stuart*, in March, 1888, commenced this action, alleging that the Defendants were selling garments and articles coming within the class of articles in the sale of which the businesses mentioned in the lease of 1879 consisted, and claiming an injunction to restrain the Defendants "from carrying on or permitting to be carried on in or upon" their premises "the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen."

It appeared on the evidence that "ladies' outfitting" consisted in the sale of all articles of underclothing worn by ladies and some other articles of dress not coming under the description of underclothing, as caps, hats, and handkerchiefs. Some witnesses considered it to include all articles of female dress.

The Defendants were carrying on business as drapers and

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hosiers, and their sale of the following articles, which was admitted by them, was relied on by the Plaintiff:—

"(1.) Vests, combinations, and spencers, Swiss-ribbed in wool. (2.) Vests and drawers in spun silk. (3.) Vests in cotton and Anglo-Indian (silk and gauze). (4.) Vests, combinations, spencers, and drawers, in summer and winter merino (white). (5.) Vests, combinations, and drawers, in Scotch lambs' wool (white). (6.) Vests and combinations, in Scotch lambs' wool (natural, undyed)"—*i.e.*, Ladies' vests, combinations, spencers, and drawers, in different materials. There was evidence that hosiers usually kept and sold articles of this kind, and that the sale of them was not at all confined to ladies' outfitters.

The action was heard before Mr. Justice *Kekewich* on the 23rd of May, 1889.

Warmington, Q.C., and *Chadwyck Healey*, for the Plaintiff.

Barber, Q.C., and *Dauney*, for the Defendants.

KEKEWICH, J.:—

The Defendants, as assignees of the covenantor, are bound by the covenant made by him in the lease to the Plaintiff, that there shall not be carried on upon the premises now occupied by the Defendants the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen. I may dismiss those last two trades, because the case has been argued with reference to the first only. The business of a ladies' outfitter appears to be one of modern invention, but it must have been known at the date of this lease, that is, in June, 1879, and I think must be taken to have been known for some little time before that, and until the present moment. I can quite understand that where one is dealing with a newly invented business or a newly developed business great difficulties might occur in saying what is within that business strictly and what is not; because as the exigencies of trade and the demands of customers, male or female, increase or diminish, the character of the business would have to be varied accordingly, and it is quite possible that a person might be entitled to carry on (notwithstanding such a restrictive covenant as I have here) a business which has become an essential part of the business which is not allowed to be carried on. But I have no question of that kind arising here. It is not doubted that the business of a ladies' outfitter was known in 1879 substantially as it is now. There has been no attempt to explain any varieties or any modifications of the business, and although one of the articles which has formed a staple of the evidence is of modern invention, still it appears to have been known for many years—I should conclude from the evidence as long ago as 1879—and at any rate it was the legitimate successor of two articles which were before that sold separately. Having no difficulty of that kind, I have also no difficulty in saying for the purposes of this case what the trade or business of a ladies' outfitter is. Mrs. *Stuart* was perfectly clear on the point. She said that she, as a ladies' outfitter, sells underclothing of every description, in every material and of every character of garment. Has that in the slightest degree been contradicted ? I have had a considerable amount of evidence to shew that in large establishments, such as *Debenham & Freebody's*, it is found convenient to distribute the business into departments, and that these things about which we have been inquiring here are sold generally—it may be said universally—although I do not think the evidence goes so far—in the hosiery department, and not in the ladies' outfitting department. To my mind that evidence is of very little use. That is a mere distribution of trade for the convenience of service of customers in a large establishment. The Defendants have not called one single ladies' outfitter, and have given me directly no information respecting a ladies' outfitting business—in fact, they have accepted Mrs. *Stuart's* statement.

But Mrs. *Stuart* does not stand alone. I had the advantage of seeing a witness of the name of *Biddle*, who represents Messrs. *Hayward* of *Oxford Street*, who, in addition to carrying on the business of lacemen, which we may put aside, do carry on the business of ladies' and juvenile outfitters, both wholesale and retail. They sell all these four articles which have been inquired into, and they have no hosiery department, and therefore there is no such distribution as occurs in some other places. Mr. *Biddle* said that he should include all articles worn under the dress as part of a ladies' outfitting business. That is again strongly confirmed by the evidence of one witness called this morning by the Defendants, and the only witness of the Defendants who really has given me much assistance. I refer to Mr. *Walton*, one of the managers of Messrs. *Debenham & Freebody*. He spoke of the distribution of departments with which I have dealt, and I am not referring to that part of his evidence. But it so happens that he has had some country experience; he has carried on business on his own account, and he knows something about such things, and although at *Reading*, where he carried on business, he seems to have had a hosiery department, and to have sold these things in the hosiery department, still he was able to tell me from his country experience that in country towns, where a ladies' outfitting shop is to be found, you would buy all these goods at the ladies' outfitting shop, and that they must be kept —that they are an essential part of the trade—and Mr. *Walton* told me in the plainest manner that if a ladies' outfitter gave up selling these goods, or, rather, did not sell these things, it would necessarily limit her trade—that it would drive away customers who would come to her for these goods, and, not finding them, would go elsewhere not only for those but for others. That seems to me to be precisely the evidence which supports the Plaintiff's case. It must be something included in a particular trade or business which is an essential part of the business.

Mr. *Barber* put it to me that difficulties occur where trades overlap. I quite recognise that, and I think it is the strongest way of putting the Defendants' case, and it would be easy to put many cases where the overlapping would be such that it would not be interfered with by such a mode of dealing as this. Again I can quite understand cases in which a tradesman restricted in business by such a covenant as this would not be liable to an injunction, and not be liable to the consequences of an injunction merely for occasionally selling one or two articles also sold by the rival protected by covenant. It is extremely difficult to lay down any general rule for the solution of such difficulties as might occur in that overlapping, but none of those considerations in my judgment are in the slightest degree applicable to a case of this kind, when I find it proved and practically admitted that a ladies' outfitting business, necessarily as an essential part of that business—as a part of that business which cannot be given up without limiting the business—includes the sale of these articles, and that these articles are sold by the Defendants as part of what they are pleased to call (I do not find fault with them for calling it so) a hosiery or draper's business. They are sold by hosiers, they are sold by drapers, they are manufactured by hosiers, and on hosiery frames, but they are an essential part of a ladies' outfitting business, and it is that business which is protected.

To my mind, on the evidence which I have before me, there is no reasonable doubt that Mrs. *Stuart* is entitled to say, "If I have a competitor in the sale of these things I have a competitor in the trade or business of a ladies' outfitter, that is to say in an essential part of my own trade, and that is exactly what the covenant says I shall be free from." To my mind, therefore, these Defendants are infringing the covenant, and must be enjoined from so doing in the future.

His Lordship then expressed his opinion on the question of *laches* which had been raised, that the Plaintiff had not been negligent of her rights.

C. M.

C. A.

The Defendants appealed from this decision. The appeal came on for hearing on the 10th of December, 1889.

Everitt, Q.C., and *Dauney*, for the Appellants:—

A covenant in restraint of trade is always to be construed strictly: *Holt & Co.* v. *Collyer* (1), and it is so laid down in *German* v. *Chapman* (2), although the decision in that case was in favour of the plaintiff. The Defendants do not carry on the business of ladies' outfitters but the trade of hosiers, and only sell such things as hosiers are in the habit of selling. The mere fact that in the sale of some few articles the Defendants' trade overlaps that of the Plaintiff is no breach of the covenant: *Jones* v. *Bone* (3). The syllogism on which the judgment of Mr. Justice *Kekewich* is based is this: "All ladies' outfitters sell combinations—the Defendants sell combinations—therefore the Defendants are ladies' outfitters."

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(1) 16 Ch. D. 718.

(2) 7 Ch. D. 271, 276.

(3) Law Rep. 9 Eq. 674.

Chadwyck Healey, for the Plaintiff:—

[FRY, L.J.:—I have some difficulty in seeing how you have a right of action against the Defendants. The covenant is only not to give consent to the business being carried on. The difference of the language as to 9 and as to 11 and 12 is singular.]

It comes to a bargain that the business shall not be carried on there. Moreover, according to *Nottingham Patent Brick and Tile Company* v. *Butler* (1) and *Collins* v. *Castle* (2) the covenant in the Defendants' lease can be enforced by the Plaintiff. Now, has not the covenant been broken? The Defendants are selling articles the sale of which is an essential and important part of the business of a ladies' outfitter, and the Plaintiff's business will be most seriously damaged if this is allowed to continue.

[COTTON, L.J.:—Is there any department in the Defendants' shop set apart for the sale of articles the sale of which you complain of?]

We cannot say that there is.

[BOWEN, L.J.:—A hosier's business is one thing, the business of a ladies' outfitter is another. Is a hosier carrying on the business of a ladies' outfitter because he sells some things which ladies' outfitters sell?]

Feilden v. *Slater* (3), where a grocer was restrained from selling spirits in bottle, is very like the present case. The Defendants cannot escape from the covenant because they do not sell all the things which ladies' outfitters sell. Suppose a covenant that the business of a tobacconist should not be carried on upon certain premises, could a tobacconist set up there and protect himself as not having broken the covenant because he did not sell snuff there?

[FRY, L.J.:—Could you under such a covenant prevent a tavern keeper from selling cigars to customers?]

Probably not, for that would not be carrying on trade as a

(1) 16 Q. B. D. 778.

(2) 36 Ch. D. 243.

(3) Law Rep. 7 Eq. 523.

tobacconist, the cigars not being supplied to the public at large, but only to persons who came to the house for other purposes.

COTTON, L.J.:—

This is an action by a lady to restrain the Defendants from carrying on the business of a ladies' outfitter at the house and shop No. 9, *Mount Pleasant, Tunbridge Wells,* on the ground that they took their lease of this house with notice of a covenant which prohibited the carrying on there of that business. The covenant was a covenant by the lessors contained in a lease of No. 10 to the Plaintiff's testator, and was as follows: "that they will not permit or suffer to be carried on, in, or upon the adjoining dwelling-houses and shops known as 11 and 12 *Mount Pleasant* the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen, nor give their consent to such trades or businesses being carried on at or upon the shop numbered 9, *Mount Pleasant,* now occupied by Mr. *Kempson* as a wine merchant."

It is an important question whether there is in this covenant anything which can be enforced against the Defendants under the principle of *Tulk* v. *Moxhay* (1). I give no opinion on that point, which was not much argued before us. For, assuming the Defendants to be precluded from carrying on the business of a ladies' outfitter at this place, we are all of opinion that the action must fail on the ground that the Defendants are not shewn to be carrying on that business there.

From the evidence, it appears that the business of a ladies' outfitter consists in selling all articles of underclothing for ladies, and some other articles which are not underclothing—as caps, hats, and handkerchiefs. The Defendants are carrying on the business of hosiers and drapers, and are selling various articles which are sold by ladies' outfitters. Mr. Justice *Kekewich* came to the conclusion that the business of a ladies' outfitter could not be successfully carried on without the sale of these articles, and that therefore the Defendants are carrying on the trade of a ladies' outfitter. I think that this conclusion is wrong. If it could be made out that the sale of these articles made up the

(1) 2 Ph. 744.

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business of a ladies' outfitter it would be quite another question, but it does not follow, because it is necessary for a ladies' outfitter to sell certain articles, that every one who sells these articles is carrying on the business of a ladies' outfitter. Suppose, for instance, that the sale of corsets is an important part of the business of a ladies' outfitter, it could not be contended that a person who sold corsets, and nothing else, was to be considered a ladies' outfitter. That trade is not carried on by any one who does not sell substantially all articles of ladies' underclothing. The Defendants sell many things which are not sold by ladies' outfitters, and do not sell many things which are sold by ladies' outfitters. They sell some things which are sold by ladies' outfitters, but they sell them in the ordinary course of their business as drapers and hosiers. The covenant is not against selling any of the articles which are sold by ladies' outfitters, such a covenant would raise quite a different case. If the sale of other articles by the Defendants had been merely colourable and adopted for the purpose of preventing their being considered ladies' outfitters, that would not protect them; but the evidence wholly fails to shew that they are substantially carrying on the business of ladies' outfitters. *Feilden* v. *Slater* (1) was relied on by the Respondent, but there the covenant was quite different. It was that the building should not be used "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale, or beer," and the sale by the defendant of spirits in bottle, though in the course of his business as a grocer, was within the plain words of the covenant. If the covenant here had been framed with more careful regard to the interest of the Plaintiff's testator it might have said that the premises should not be used for the sale of ladies' underclothing, which would have made the case similar to *Feilden* v. *Slater*. I am of opinion that the decree must be reversed, and the action dismissed.

BOWEN, L.J.:—

I am of the same opinion. I will assume, though I am not convinced, that the Defendants are under an obligation which the Plaintiff can enforce against them not to carry on the business of a ladies' outfitter. Assuming this, the obligation does not come to the same thing as an obligation not to carry on any part of that business. The business of a ladies' outfitter is one business—the business of a hosier is a distinct business. The two businesses overlap each other by having four classes of articles the sale of which is common to them both. But a covenant not to carry on the business of a ladies' outfitter is not broken by carrying on the business of a hosier, and the hosier commits no breach by selling some articles which are usually sold by a ladies' outfitter, if he does it in the ordinary course of the business of a hosier. Mr. *Dauney* put the argument of the Respondent very happily in the form of a syllogism: "All ladies' outfitters sell combinations, the Defendants sell combinations, therefore the Defendants are ladies' outfitters." I do not think that a covenant not to carry on the business of a ladies' outfitter is broken by carrying on a part of that business, which is also a part of another distinct business, even though it be a substantial part of the business of a ladies' outfitter and only a subordinate part of the other business. A colourable selling of other things by a person for the purpose of making himself out to be a hosier and not a ladies' outfitter is not within what we are saying.

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(1) Law Rep. 7 Eq. 523.

FRY, L.J.:—

I also am unable to agree with Mr. Justice *Kekewich*. The Plaintiff sues for breach of a covenant by the lessor of the Plaintiff and the Defendants not to give consent to the business of ladies' outfitting being carried on at or upon the Defendants' premises. The Defendants admit that they took their lease with notice of this covenant. I am not convinced that the Plaintiff can sue the Defendants on that covenant, but assuming that she can, I still think that her case fails. There is no covenant against the carrying on any part of the trade of a ladies' outfitter, nor against the sale of any particular articles. There is no ground for stretching the covenant beyond its words. A ladies' outfitter deals in articles of ladies' underclothing; some of these goods are in the ordinary course of business sold by hosiers, others of them are not. As to some articles, the two businesses overlap. Can it be said that a hosier is carrying on the business of a ladies' outfitter because he sells these goods? If so, then every hosier is a ladies' outfitter, and every ladies' outfitter is a hosier, a conclusion to which I should not come without necessity. There being no covenant against carrying on any part of the business of a ladies' outfitter I think that the Plaintiff cannot maintain her case.

Solicitors for Plaintiff: *Sole, Turner, & Knight,* agents for *W. C. Cripps & Son, Tunbridge Wells.*
Solicitor for Defendants: *Edward Chester.*

H. C. J.

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CHITTY, J
Dec. 5.
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Jan. 22.

WARD *v.* LAWSON.

[1872 W. 128.)

London Agent of Country Solicitor—Interest on Costs.

W. was the country solicitor of the *Sittingbourne and Sheerness Railway Company.* *L.* agreed to act as his *London* agent in the company's business on the usual agency terms, except that *L.* should not call on *W.* to pay any of his agency bills until *W.* had obtained payment of his bill of costs from the company. There was difficulty in obtaining payment from the company, but ultimately, by means of a litigation which lasted eleven years, *W.* obtained payment from the company of the amount of his bill of costs, with a considerable sum for interest:—

Held, by *Chitty*, J., that in taking the accounts between *W.* and *L.*, *W.* must bring into account the interest received by him from the railway company:

Held, by the Court of Appeal, that the usual agency terms being that the agent should be repaid his disbursements, and receive, not half the profits, but half the profit charges whether they were paid by the client or not, he was entitled to nothing more, and could not claim to participate in the interest; for that although his suspending his right to payment would have made a stipulation for interest reasonable, the Court could not import such a stipulation from the mere fact of his agreeing not to claim payment till *W.* had received the amount of his bill.

The order of *Chitty*, J., was therefore discharged.

THE Plaintiff *Ward*, a country solicitor, in 1856, promoted and carried through Parliament a bill for establishing the *Sittingbourne and Sheerness Railway Company,* and continued to act as the solicitor of the company when formed.

In January, 1859, *Ward* entered into an arrangement with Messrs. *Eyre & Lawson, London,* solicitors, that they should act for him as his agents in *London.* The nature of the arrangement between them was thus stated by *Ward* in par. 4 of his bill of complaint in this suit: "It was agreed between the Plaintiff and the said firm that all business introduced by the Plaintiff to the said firm and transacted by them should be so transacted as agents for the Plaintiff on the usual agency terms, and subsequently, in the year 1860, on their delivering to the Plaintiff their bill of costs for the year 1859, it was agreed between the Plaintiff and the firm of *Eyre & Lawson* that the bills of costs for business transacted by them as the Plaintiff's agents in respect of the said company should be kept separate from the Plaintiff's general agency bills, and that they should not call on the Plaintiff to pay any of their agency bills until the Plaintiff had obtained payment of his bill of costs from the company." The correspondence between the parties completely shewed that the above was the nature of the arrangement.

In September, 1867, *Eyre & Lawson* dissolved partnership, and on the dissolution it was agreed between *Ward* and *Lawson* that *Lawson* alone should act as *Ward's London* agent in all matters of business connected with the company upon the same terms as were thereinbefore stated to have been agreed to between *Ward* and the firm of *Eyre & Lawson.* The office of the company being in *London,* their legal business was conducted by *Lawson* without their communicating with *Ward,* and *Lawson* raised the contention that he and not *Ward* was the solicitor of the company.

In May, 1872, *Ward* filed his bill against *Lawson* asking for a discovery of all matters of business transacted by him as agent of the Plaintiff in respect of the railway company; for delivery and taxation of the Defendant's bills of costs in respect of such business; for accounts of all sums paid by the Defendant on account of the Plaintiff, of all sums of money received by the Defendant on account of the Plaintiff, and of all dealings and transactions between the Plaintiff and Defendant from September, 1867, to the filing of the bill; and for payment by the Defendant to the Plaintiff of the balance found due on taking the accounts. He had a few days previously filed a similar bill against *Eyre & Lawson* in respect of the transactions prior to 1867.

In 1873 a decree for accounts was made in *Ward* v. *Eyre*, and on the 26th of June, 1874, a decree was made in *Ward* v. *Lawson*, following closely that in *Ward* v. *Eyre*, and declaring that the Defendant was bound to account to the Plaintiff as his agent for all the matters of business transacted by him for or on behalf of the railway company, and his receipts and payments in respect thereof, from the 14th of September, 1867, to the 31st of May, 1872. Accounts were directed (1) of all sums of money paid or advanced by the Defendant to or for the use or on account of the Plaintiff in relation to matters of business transacted by the Defendant as mentioned in the above declaration; (2) an account of all sums of money received by or come to the hands of the Defendant to or for the use of the Plaintiff in relation to the matters aforesaid; (3) an account of all dealings and transactions between the Plaintiff and the Defendant in relation to the matters aforesaid. The Defendant was ordered to deliver to the Plaintiff copies, or produce to him the original drafts, of all bills of costs against the railway company up to the 31st of May, 1872, already delivered to the company by the Defendant, and that all bills of costs not already delivered to the company to the same date should be made out as agency bills in the usual form and submitted to the Plaintiff before delivery, and that the balance due from either party to the other should be certified, and either party to whom a balance should be certified to be due was to be at liberty to apply in Chambers as to payment and as to subsequent costs of the cause, provided that the Defendant was not to be at liberty to enforce the payment by the Plaintiff of any sums of money which might appear to be due to him in respect of any bill or bills of costs incurred by the railway company for any business transacted by the Defendant for the railway company unless or until the company should have paid the amount of the bill or bills of costs to the Plaintiff. It was ordered that the Plaintiff and Defendant should respectively proceed to get in all moneys due from the company or from litigants with the company to the Plaintiff and Defendant respectively, and the Defendant was ordered to pay the costs of the suit up to and including the hearing.

On the 17th of July, 1875, a decree was made by Vice-Chancellor *Malins* in a suit of *Ward* v. *Sittingbourne and Sheerness Railway Company*, commenced by the Plaintiff in 1873.

This decree directed, among other accounts, (1) " An account of all dealings and transactions between the Plaintiff or his agents and the Defendants, the *Sittingbourne and Sheerness Railway Company*, from the 1st of January, 1856. And it is ordered that what upon taking the said accounts shall be certified to be due from either of the parties to the other of them within one month after the date of the Chief Clerk's certificate, be paid by the party from whom to the party to whom the same shall be certified to be due, and in taking such account the Plaintiff is to be allowed interest at the rate of £4 per centum per annum."

Great delay took place in the prosecution of the account directed in the suit against the railway company, but ultimately, in June, 1884, the Plaintiff obtained payment from the company of the final balance of the bills of costs, including a considerable sum for the interest allowed by the decree in that suit.

The accounts in *Ward* v. *Lawson* were still in course of being taken, and the question was raised in Chambers whether *Ward* must not bring into account the sums which he had actually received from the company for interest, so as to give *Lawson* the benefit of so much of that interest as was attributable to the share of profit costs to which he was entitled as agent. A summons to have this point decided was adjourned into Court, but before it came on *Ward* died on the 17th of May, 1889.

The Defendant, in October, 1889, obtained leave to carry on the suit against *Ward's* personal representatives, and the adjourned summons came on before *Chitty*, J., on the 5th of December, 1889.

Romer, Q.C., and *B. Eyre*, for the summons:—

We are not seeking to charge the Plaintiff personally, or rather his estate, with interest; we only ask that the interest received by

Mr. *Ward* from the railway company should be brought into account and shared with us as part of the profit costs.

Byrne, Q.C., and *Chadwyck Healey*, for the Respondent:—

There is no bargain entitling the agent to charge or claim interest. The only arrangement between the parties was that the bills of costs for business done for the railway company should be kept separate from the general agency bills, and that we were not to be called on to pay until we had obtained payment from the company.

[*Ward* v. *Eyre* (1) was referred to.]

Romer, in reply.

CHITTY, J.:—

The question on this summons arises upon taking the accounts under the decree; the question is not whether the late Mr. *Ward*, the Plaintiff, is to be charged with interest personally, but whether he is to account for interest which he has received from the *Sittingbourne Railway Company*. [His Lordship then stated the facts as to the business relations between the Plaintiff and Mr. *Lawson*, read the agreement as to the costs against the railway company from the bill of complaint and the decree; commenting on that portion of it which was founded on the agreement, and continued:—]

Now, it is clear in this case, from the terms of the agreement I have read, that if Mr. *Lawson* had received the amount of the bills from the railway company, he must have allowed, as between himself and Mr. *Ward*, in his account, the sum that he actually received, and if that sum had included the original principal of the demand and interest for forbearance, then he would be chargeable with interest, and the interest would then go as part of the profit to be divided between these two persons. Unquestionably the main line of the arrangement was that of principal and agent; but there was something more, and the clause I have read makes it a special agreement. It shews that, contrary to the ordinary practice, Mr. *Ward* could not be sued until he had obtained the money; and it contemplated that the Defendant, Mr. *Lawson*, might receive the money, and when he got the money in his hands, whatever it was, that would form part of the subject-matter for division between the two. The disbursements, of course, whosesoever disbursements they were, would be taken out of the fund received, and then in the ordinary case there would be profit costs, and only profit costs to divide. But in this case there would also be profit interest that would be divisible between the two. It would be clearly so if the Defendant received it, and why not if the Plaintiff received it? What has happened is this—that the railway company have not been induced or compelled to pay for many years, and in the account that has been brought in, account *A*, it appears that the railway company has paid interest on these bills of costs for various long periods of time—the longest period I have noticed being twenty years. I think that the meaning of the agreement is, not that Mr. *Ward* should pay interest, but that the profit should be divided between the *London* agent and the principal on the terms of the interest which should be received by each one from the debtor, the railway company, being brought into account. That is the only question I have to decide, and I therefore direct the interest received by Mr. *Ward* from the company to be brought into account.

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(1) 15 Ch. D. 130.

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C. A. *Ward's* representatives appealed. The appeal was heard on the 22nd of January, 1890.

Byrne, Q.C., and *Chadwyck Healey*, for the Appellants:—

A contest as to interest arose in *Ward* v. *Eyre* (1), but there the claim by the agents was to make *Ward* personally liable to pay interest. Here the claim is to give the Defendant a share of the interest which *Ward* received from the clients. We say that this claim has been wrongly allowed. The Defendant can have no ground for it except special contract, and the contract is silent about interest. There is only one special stipulation in the contract—that *Lawson* shall not call for payment till *Ward* has been paid; subject to that stipulation the ordinary agency terms remain unaffected, and allowing interest is no part of those terms. Nor can an agreement as to interest be imported from a mere agreement to postpone enforcing a claim.

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Romer, Q.C., and *Eyre*, for *Lawson* :—

The claim of *Lawson* is founded on natural justice.

[COTTON, L.J. :—It might be according to natural justice that in all cases where payment of a sum is delayed interest should run, but that is not the law of *England*.]

We contend that there is no distinction between this interest and any other money which is paid in respect of the costs. It is money recovered in respect of the costs. Suppose an item omitted and afterwards recovered. Surely that must be brought into account. The position of the parties is that the *London* agent does the work, and after payment of disbursements takes half the profits.

[COTTON, L.J. :—Is not his position this, that he is entitled to half the profit charges ?]

We submit not. The relation is much in the nature of a partnership. If the client had his bill taxed the *London* agent would be bound by the taxation, and could only claim his share of what was allowed. So here, whatever the client pays must be taken as being the proper amount for him to pay in respect of the costs, and whether it is only principal or partly principal and partly interest makes no difference. Interest should be allowed here according to the rule laid down in *De Havilland* v. *Bowerbank* (1)

[Before the close of the argument the Court conferred with Mr. *Ryland*, the Taxing Master, as to the nature of the usual agency terms.]

COTTON, L.J. :—

This is an appeal from the decision of Mr. Justice *Chitty* on a point which has arisen in taking the accounts as between these parties. Though the order does not in terms state anything as to payment by the Plaintiff to the Defendant, yet I think it

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(1) 1 Camp. 50.

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must be taken to mean not only that the Plaintiff is to account for the interest in the sense of saying what interest he has received, but that the Defendant is entitled, under the arrangements between the parties, to half of that interest. To my mind the question turns on what were the real terms of the agreement between the deceased Plaintiff and the Defendant.

The original Plaintiff *Ward* was a country solicitor, and the Defendant who was in partnership with another gentleman was a *London* solicitor. Originally undoubtedly *Ward* was the solicitor of the railway company, and he applied to the Defendant's then firm to transact some business for the railway company. I think it is hardly to be doubted that the relation between the parties originally was that of country solicitor and *London* agent, but subsequently a special agreement was made between them. The Defendant contended that afterwards at a later period *Ward* ceased to be the solicitor of the company, and that then the Defendant became himself the solicitor of the company, and that therefore the relation between the Plaintiff as country solicitor and the Defendant as *London* agent came to an end. In my opinion it is not shewn that there was any putting an end to the agreement to which I have referred, but that agreement, in my judgment, still regulates the rights of the parties. The agreement was this: the Plaintiff made an arrangement with the firm of *Eyre & Lawson* that the firm should act for him as his agents in *London*, and it was agreed between the Plaintiff and the firm that all business introduced by the Plaintiff to the firm and transacted by them should be so transacted as agents for the Plaintiff on the usual agency terms. To my mind that means that any moneys received in respect of the business so introduced, even though at the time the Defendants were not really in the position of *London* agents for the country solicitor, should be dealt with on the usual agency terms. The Defendant *Lawson* alone afterwards transacted the company's business in *London* on the same terms. Now, in the usual case, the *London* agent has no claim at all against the client, but he can sue the country solicitor for what is due to him on the arrangement usually regulating the distribution of moneys received or charged for in respect of bills of costs.

On the argument of this appeal there was a considerable discussion as to what was the claim of the *London* agent as against the country solicitor. Of course, the *London* agent is entitled to all sums paid by him out of pocket. But there are many other charges in solicitors' bills where there is no actual expenditure by the solicitor; he makes charges for professional services and attending the client, giving advice, and many other matters. These are called profit charges, and such charges are made for services rendered by the *London* agent. The contest then, is, was the *London* agent entitled to half the profit made on the bill of costs in respect of the transactions in which he was engaged, or was he entitled to half the amount of the profit charges? We did not feel justified in deciding that point without getting the opinion of a man who would know very well from his position as Taxing Master, and his former position as solicitor, what were the usual agency terms, and we learn from Mr. *Ryland* that the *London* agent is entitled only (apart from the charges for what he has paid out of pocket), to half the amount of those charges which are called profit charges, that is, those charges which do not involve any expenditure of money by him. It is from the use of the term "profit charges" that the difficulty has arisen.

The contention raised here on behalf of the Defendant is that a *London* agent is entitled to half the profit. We are told by Mr. *Ryland* that this is not so. He says that the *London* agent has nothing to do with the profit made by the solicitor, nor, unless there is some special arrangement, is he in any way implicated in any loss which the country solicitor may suffer by reason of the client not being able to pay him.

Now is there any arrangement here which alters that—which gives the Defendant here a claim to half the profit? It is said that there is, because this business was not carried on upon the usual agency terms, and in my opinion it was not. But the agreement only departed from the usual agency terms in this, that the Defendant was not to sue the Plaintiff until the Plaintiff had obtained payment of his bill of costs from the company. The words are that the agents should not call upon the Plaintiff to pay any of their agency bills until the Plaintiff had obtained payment of his bill of costs from the company. That does not to my mind affect the question what amount the Defendant is entitled to claim from the Plaintiff, his principal; it only provides that he shall not claim anything in respect of what he is entitled to as agency charges unless and until the Plaintiff obtains payment of the bill of costs from the company. In my opinion there is nothing in that which gives the *London* agent any right to anything more than he would get according to the usual agency terms. The mere saying that he shall not claim anything till a certain time does not alter in any way the amount which he can claim when that time arrives.

Then it is said that natural justice gives him a claim as against the country solicitor on any interest the latter may obtain in addition to the amount of the profit charges. It might have been very reasonable to insert a stipulation in the agreement that he should have such a claim, but the parties have not done so, and in my opinion it would be wrong simply because the *London* agent has agreed not to sue the country solicitor until certain events happen, to import by implication into the agreement a stipulation that if in consequence of the delay the country solicitor gets any interest paid to him then the *London* agent shall have half that interest.

In my opinion the view of Mr. Justice *Chitty* was wrong, and I think the appeal must be allowed.

LINDLEY, L.J.:—

The difficulty of this case arises from the difficulty of ascertaining the exact meaning of the agreement which was entered into between the parties and upon which the decree is based.

There is nothing in the decree which settles this point one way or the other. It is true that the 3rd clause directs an account of all dealings and transactions between the parties, but it says nothing about interest. To decide the question before us we can therefore only look at the agreement itself.

Now the agreement was entered into at two different times. It is set out in par. 4 of the bill in *Ward* v. *Lawson*. The first agreement was in January, 1859, when it was arranged that certain business (which I shall for shortness call "the business") should be transacted by *Eyre & Lawson* as agents of the Plaintiff on the usual agency terms. Then, after that, in 1860, there was a further agreement embodying this important stipulation, that the town agents should not call upon the Plaintiff to pay any of their agency bills relating to the company's business until the Plaintiff had obtained payment of his bills of costs from the company, and that those bills should be kept separate from the general agency bills.

Now the first question is, What is meant by the expression "on the usual agency terms"? I confess I thought, until Mr. *Ryland* made it plain that I was wrong, that the town agent shared the profits made by the country solicitor, but that is not so; Mr. *Ryland* tells us that what is meant by "the usual agency terms" is this: that the town agent has nothing to do with the profits, and he gave us a very remarkable case in which he was town agent, and the country solicitor got from a grateful client £500, of which the town agent did not get a farthing. The town agent does not share the profits, and has nothing to do with the profits; his rights are these: he gets his disbursements, and is entitled to half of certain charges which are called profit charges to distinguish them from disbursements. When once we have ascertained that the usual agency terms have nothing to do with sharing profits, then this case becomes easy of solution. The expression being so understood, there is nothing in the agreement which can be interpreted so as to involve as a consequence the right of the town agent to share any profits, whether they come in the shape of interest or whether they come in the shape of gift or otherwise to the country solicitor. The sum which the town agent is to be entitled to is to be ascertained upon a different footing altogether, and there is nothing in the decree which in any way varies that. In consequence of the fact that Mr. *Lawson* had apparently worked or assumed to work for the company as principal and not merely as an agent, and claimed to have been the principal, it became necessary in pronouncing the decree to define the position of the two parties, and there is, therefore, first of all a declaration that the Defendant is to account as agent, and after two accounts have been directed, the third clause directs an account of all dealings and transactions, which was much relied on by the Respondent. Then there are certain clauses

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with reference to getting in what is due from the company, and both parties are to get in as best they can what may be payable from the company to them or either of them; but I cannot see a word in the decree which entitles the town agent to more than the agreement gives him, and it appears to me that that is where Mr. Justice *Chitty* has gone wrong; because he seems to have attributed to this decree a force and effect which I do not think it bears. He says, "It is clear in this case, from the terms of the agreement which I have read, that if Mr. *Lawson* had received the amount of the bills from the railway company, he must have allowed as between himself and Mr. *Ward* in account the sum he actually received"—he certainly must—"and if that sum had included the original principal of the demand and interest, then he would be chargeable with interest, and the interest would then go as part of the profit to be divided between these two persons." There, I think, is a mistake. He would have had to hand over the amount of that interest to the person to whom it belonged, and that is the country solicitor. I cannot, now that I understand the meaning of this agreement, spell out of it anything which can entitle Mr. *Lawson* to interest on these bills. He has stipulated that he will not demand payment until the railway company pays. The delay has been very considerable, and nothing would have been more reasonable than for him to have stipulated that he should have interest if the railway company paid interest. But he has not done anything of the kind, and I think that it is incumbent upon him to shew some agreement entitling him to interest. At first I thought it was the other way. I thought it would require an agreement to disentitle him, but when we understand accurately the meaning of the phrase "usual agency terms," which Mr. *Ryland* has explained to us, I think that it lies on the Defendant to shew an agreement giving him interest, which he has not done. This appeal, therefore, must be allowed.

LOPES, L.J.:—

In the judgment in *Ward* v. *Eyre* (1) Lord Justice *James* says that the account in question is an agency account between a *London*

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solicitor and the country client. The relation therefore between the Plaintiff and the Defendant in this case is that between a country client and a *London* agent. What then is an agency account? or in other words, what is a *London* solicitor entitled to receive in respect of agency charges from the country solicitor? He is entitled to receive all out-of-pocket expenses, and he is entitled to receive a share of the profit-charges, be it a half or a third, whichever may be the arrangement between them. This, to my mind, is a very reasonable arrangement in respect of these charges. The country solicitor does nothing whatever; but on the other hand, he has introduced the business to the *London* solicitor. Moreover, the country solicitor remains immediately responsible to the client, and therefore it seems to me fair that he should be remunerated, although the work is done by the *London* agent.

Now, when it is clearly understood what the agency charges are, it is not very difficult to interpret this agreement. It means this, the country solicitor is speaking, and says: "You, the *London* agent, are to have your share of the profit-charges, but subject to this, that you are not to be entitled to have that share paid to you by me until I have obtained payment of the bill of costs which I shall send in to the company."

That being so, I am of opinion that Mr. *Lawson*, the *London* agent, is not entitled to recover the interest which he seeks to recover in this case, and that this appeal must be allowed.

Solicitors: *Sole, Turner, & Knight; A. Scott Lawson.*

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LEESON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION.

[1889 L. 2936.]

Judicial Inquiry—Domestic Forum—Personal Interest of Member of Tribunal—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90), *s.* 29 [*Revised Ed. Statutes, vol. xiii., p.* 371].

The *General Council of Medical Education and Registration*, acting under the powers of the *Medical Act*, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect, and removed his name from the register of medical practitioners.

The proceedings were instituted by the managing body of a company called the *Medical Defence Union*, whose object was to protect the characters of medical practitioners and to suppress and prosecute unauthorized practitioners. Two out of twenty-nine persons who held the inquiry were members of the *Medical Defence Union*, but not of the managing body of the Union:—

Held, by *Cotton* and *Bowen*, L.JJ. (affirming the decision of *North*, J.), *dissentiente Fry*, L.J., that the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry; and the Court refused to interfere with the decision of the Council.

THE *General Council of Medical Education and Registration of the United Kingdom* was constituted under the *Medical Act*, 1858 (21 & 22 Vict. c. 90), as amended by 25 & 26 Vict. c. 91, and 49 & 50 Vict. c. 48. It consisted of thirty persons, five of whom were appointed by the Queen, five were elected by the registered medical practitioners in *England*, *Scotland*, and *Ireland*, and the rest were elected by various public bodies in the *United Kingdom*. One of the duties of the *General Council* was to regulate the registration of medical practitioners; and the 29th section of the statute proceeded as follows: "If any registered medical practitioner shall be convicted in *England* or *Ireland* of any felony or misdemeanour, or in *Scotland* of any crime or offence, or shall after due inquiry be judged by the *General Council* to have been guilty of infamous conduct in any professional respect, the General Council may, if they think fit, direct the registrar to erase the name of such medical practitioner from the register."

On the 27th and 28th of November, 1889, the *General Council* held an inquiry as to the conduct of the Plaintiff, *Joseph Richard Leeson*, a duly qualified medical practitioner in *London*, on a charge preferred by the *Medical Defence Union* for infamous conduct in a professional respect.

The notice of the proposed inquiry, which was sent to the Plaintiff by the secretary of the *General Medical Council* on the 15th of November, stated the complaint against him to be as follows: "For that you, being a registered medical practitioner, do act as cover of, or by your presence, advice, or assistance, do enable one *Cornelius Bennett Harness* (an unqualified person) to carry on the business or profession of a medical electrician, and to practise as if he was duly qualified under the style of the *Medical Battery Company, Limited*, and the *Electropathic and Zander Institute*, at 52, *Oxford Street, London*, the said *C. B. Harness* publicly advertising himself as the *Medical Battery Company* Consulting Medical Electrician."

The complaint was brought and the evidence in support of it was produced by the *Medical Defence Union*. This was a company registered under the *Companies Acts*, and limited by guarantee. Its objects, so far as material to this report, were, (1.) To support and protect the character and interests of medical practitioners practising in the *United Kingdom*. (2.) To promote honourable practice, and to suppress or prosecute unauthorized practitioners. The other objects were: (3.) To assist members of the Union in proceedings against them. (4.) To promote legislative measures beneficial to the profession, and (5.) To do such things as should be conducive to the particular objects of the Union.

The Union was governed by a Council consisting of twelve members, who had general powers of managing the affairs of the Union. One of the articles was as follows: "The management of the business and the control of the Union shall be vested in the Council, who, in addition to the powers and authorities by these articles expressly conferred on them, may exercise all such powers and do all such acts and things as may be exercised and done by the Union, and are not hereby or by statute expressly directed or required to be exercised or done by the Union in general meeting." And another article provided that "The objects for which the Union is established shall be carried out in the manner provided by these articles, except that the second of the objects of the Union as there set forth, so far as relates to the suppression or prosecution of unauthorized practitioners, shall not in any case be acted upon without the sanction of a unanimous resolution of the Council, confirmed by a majority of members present and voting at a general meeting."

The meeting of the *General Medical Council* on the 27th and 28th of November, 1889, was presided over by Mr. *J. Marshall.* The *Medical Defence Union* was represented by its solicitor, and the Plaintiff by his solicitor. Certain depositions were read on both sides, and Mr. *Harness* and Mr. *Leeson* were examined, but they were not examined on oath and their evidence was not confined to such evidence as would be admitted in a Court of law. Certain pamphlets written by Mr. *Harness* were also referred to. At the close of the proceedings the *General Medical Council* announced their decision as follows:—

That the Plaintiff had committed the offence charged against him;

That the offence was in the opinion of the Council infamous conduct in a professional respect; and

That the registrar be directed to erase his name from the Medical Register.

There were twenty-nine members of the Council present. Two of them, Mr. *Teale* and Dr. *Glover*, were members of the *Medical Defence Union*, to which they subscribed 10*s.* a year, but neither of them was on the council of management, or had anything to do with making the complaint against the Plaintiff. The Plaintiff was not at the time of the inquiry aware of the fact that these gentlemen were members of the Union, and therefore no objection was made at the time to their taking part in the inquiry.

The Plaintiff brought the present action to restrain the *General Medical Council* from removing his name from the register of medical practitioners, and from publishing the resolutions which they had passed with respect to his conduct.

The Plaintiff now moved for an injunction in the same terms.

The motion was heard before Mr. Justice *North* on the 13th of December, 1889.

Cozens-Hardy, Q.C., and *G. Henderson*, for the Plaintiff:—

The Court no doubt will not interfere with the judicial discretion of such a tribunal as the General Council: *Ex parte La Mert* (1); *Allbutt* v. *General Council of Medical Education and Registration* (2), but where, as in this case, the charge made is outside the jurisdiction of the Council and is really not *bonâ fide*, but is an inquiry into the conduct of another person, namely, Mr. *Harness*, the Court will interfere.

In the first place, two of the judges were interested parties, being members of the body who were the prosecutors. That is sufficient to invalidate the inquiry.

At the inquiry certain pamphlets of Mr. *Harness* were considered; these were issued before the Plaintiff had any connection with the company and could not be evidence against him.

Everitt, Q.C., and *Muir Mackenzie*, for the Defendants:—

The cases *Ex parte La Mert* and *Allbutt* v. *General Council of Medical Education and Registration*, establish that where a charge of this kind, which is, as we contend, within their jurisdiction, has been honestly inquired into by a body like the General Council under statutory power, this Court cannot go into the matter, but must accept the finding arrived at.

As to the interest alleged to exist in two of the judges—they were mere members of the *Medical Defence Union*, subscribers to the fund to a small extent—they had nothing to do with the management of the Union or the prosecution of this charge. They had no personal interest in or reason for being biased in the inquiry either one way or the other.

[NORTH, J.:—In the case of the *Company of Mercers and Ironmongers of Chester* v. *Bowker* (3), referred to in *Dimes* v. *Grand Junction Canal Company* (4), a judgment was given for the *Mercers' Company* in the Mayor's Court at *Chester*: after verdict

(1) 4 B. & S. 582.
(2) 23 Q. B. D. 400.
(3) 1 Str. 639.
(4) 3 H. L. C. 759.

and before judgment one of the members of the *Mercers' Company* became mayor, and the judgment was in consequence reversed.]

The rule is laid down by Mr. Justice *Stephen* in *Reg.* v. *Farrant* (1). As stated in the head-note, it is as follows:—"Any pecuniary interest in the subject-matter of litigation, however slight, will disqualify a magistrate from taking part in the decision of a case. If a magistrate has such a substantial interest, other than pecuniary, in the result of the hearing, as to make it likely that he will have a bias, he is disqualified."

These gentlemen had neither pecuniary nor other interest except that as members of the profession they had the same interest as other members in determining what was most beneficial to the profession.

Sebastian watched the case for the *Medical Battery Company* and *C. B. Harness.*

Cozens-Hardy, in reply.

NORTH, J. (after deciding on the construction of the letter from the solicitor of the *General Medical Council* to the Plaintiff that the statement in it was a charge that he had allowed himself to be cover to Mr. *Harness* while he was practising, as if he were a duly qualified practitioner duly registered under the Act, continued as follows):—

If that is so can I consider the matter? In my opinion it is not open to me to do so, because the suggestion that there was not a proper charge giving jurisdiction to the *General Medical Council* is not well founded. It may well be that if they were trying him for something entirely outside their jurisdiction; if, for instance, it was not for conduct under the Act, but for something totally different, it might well be that the Plaintiff would have a right to say that I ought to interfere with them; but when it is clearly a matter in respect of which they have jurisdiction, then beyond all question the matter must be left to them as being one for which they are responsible and not I. The section giving them jurisdiction says: "If any registered medical

(1) 20 Q. B. D. 58.

practitioner shall be convicted in *England* or *Ireland* of any felony or misdemeanour, or in *Scotland* of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect," they may, if they see fit, have his name erased; therefore they are the tribunal which the Legislature considers the proper one to judge of what is not a legal matter, namely, whether a member of this body has been guilty of infamous conduct in any professional respect. They have jurisdiction in that matter, and they have come to the conclusion that he has been guilty. In my opinion it is not open to me to reconsider what they have considered, or to form—much less express—any judgment upon it.

Then it was said that in this case there is an objection to their jurisdiction arising from the fact that two members of the Medical Council, a body of some twenty-five or thirty, who seem to have presided over the case, were interested, and thereby disqualified from sitting as judges; and that if this were so the opinion of the body of which they were two would not be legally arrived at. If that were the case—that they were a body disqualified in the matter—it would in my opinion be open to me to say that the name could not be erased from the register.

[His Lordship stated the course of procedure that had been taken on the inquiry and proceeded:—]

It appears that the matter had been brought before the Council in the first place by a body called the *Medical Defence Union*, which appears to be an incorporated body with a subscription of 10*s*. a year and a guarantee given by the members. It is a body not formed for the purpose of profit at all, but it is what its name represents, a defence union for the purpose of maintaining the character and dignity of the profession. It is quite sufficient to state two of those objects. The first is "to support and protect the character and interests of medical practitioners practising in the *United Kingdom*." The second is "to promote honourable practice and to suppress or prosecute unauthorized practitioners."

What is said as regards the prosecution by the *Medical Defence Union* is this. It has been found on inquiry that two gentlemen, members of this body, two gentlemen whose names are sufficient guarantee for their perfect good faith and honour in the matter, who were present at the inquiry, were subscribers, and in that sense members and guarantors of the *Medical Defence Union*, who were the prosecutors. This is the only point about which from the first I had any difficulty, because it seemed to me to be a point which the parties had a right to have dealt with at the trial of the action, and there was nothing rendering it imperative on me or right that I should decide the question now; but having come to the conclusion on other points that my judgment must be unfavourable to the Plaintiff, and this being a point of law on which I have everything before me now that can be expected to be before the Court at the hearing, I have thought it right to take it upon myself to decide this point now instead of letting the matter go to the trial. In my opinion there is nothing in it. There is no pecuniary interest in these persons. The mere absence of pecuniary interest is not necessarily sufficient, but in my opinion there is nothing whatever to make these two persons, subscribers to the Defence Union, in any way improper persons to sit on the inquiry. I have not the least doubt that if it had been suggested that they had better not sit, they would have ceased to sit at once; but I cannot say that in my opinion the whole proceeding is rendered void by their having sat there. The real point suggested against them is this, that they are members of a body to suppress and prosecute unauthorized practitioners; but they are equally members of a body to support and maintain the character and interests of medical practitioners practising in the *United Kingdom*, and they owed quite as great a duty to Mr. *Leeson* to take care that he was not removed if there was not a case for it, as they did to see that he was removed if there was a case for it. They were perfectly neutral on that point. The body of which they were members were neutral on that point, and it was their duty to be so. In my opinion the fact that these two gentlemen were members of the Union does not in the least degree invalidate the opinion to which they came.

Then it was further suggested, it was very slightly suggested, that some improper evidence had been admitted. This is a case in which the Council cannot possibly decide on legal evidence.

They cannot get legal evidence. And unless they introduced and gave weight to matters the admission of which was manifestly contrary to natural justice, it is not a case in which I should feel I could interfere at all.

[His Lordship also decided that there was no want of *bona fides* in the inquiry, and refused the motion.]

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From this decision the Plaintiff appealed. The appeal came on to be heard on the 18th of December, 1889.

Rigby, Q.C., *Cozens-Hardy*, Q.C., and *G. Henderson*, for the Appellant:—

We do not dispute that where the Council has jurisdiction and the proceedings have been properly conducted, no appeal lies from their decision under 21 & 22 Vict. c. 90, s. 29. There are two cases on the subject: *Ex parte La Mert* (1), and *Allbutt* v. *General Council of Medical Education and Registration* (2), which establish that proposition. But we say here, first, that no charge has been laid against the Appellant which brings the case within sect. 29, and that the Council has therefore no jurisdiction. The charge is not made that the Appellant enabled *Harness* to practise as a duly qualified medical practitioner.

But, secondly, supposing the Council had jurisdiction, these proceedings were taken by the *Medical Defence Union*. Two members of the Council who took part in the inquiry were members of that Union, and they were thereby disqualified from sitting on this inquiry, where they had to discharge a judicial duty, and the decision of the Council is thereby invalidated: *Dimes* v. *Grand Junction Canal Company* (3). That case applies to pecuniary interest; but on the same principle a person cannot be both judge and prosecutor, and the rule is so severe that even an ordinary member of the prosecuting body, though not one of the managers of it, cannot be a judge: *Company of Mercers and Ironmongers of Chester* v. *Bowker* (4); *In Reg.* v. *Allan* (5), which was a case of conviction under the *Salmon Fisheries Act*, the con-

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(1) 4 B. & S. 582.
(2) 23 Q. B. D. 400.
(3) 3 H. L. C. 759.
(4) 1 Str. 639.
(5) 4 B. & S. 915.

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victing justices were members of the prosecuting association, and one a member of the committee of it, and the conviction was held bad, on the ground that the justices were not competent judges. It is true that in that case the association was not incorporated, but there is nowhere any trace of that making any difference. *Reg.* v. *Milledge* (1) is another instance of the strictness with which the rule is applied. *Reg.* v. *Gibbon* (2) has been doubted, and it certainly goes a great length, but the case in *Strange* supports it. The rule applies not only to judicial discretion, but to any judicial act. Neither a prosecutor, nor a member of a society which prosecutes, must be a judge in the prosecution.

Everitt, Q.C., and *Muir Mackenzie*, for the Defendants:—

The articles of association shew that the members of the *Medical Defence Union* have no pecuniary interest in the matter.

[PER CURIAM:—It is not alleged by the Appellant that they have.]

The cases cited against us are cases referring to the discharge of judicial functions properly so called. Here the Council is in no sense a judicial body. If there were fraud or *mala fides*, no doubt the Court could interfere; but the act here is not judicial, the Council are not a court; they are a sort of domestic disciplinary forum. There is really no prosecution and no prosecutor. The inquiry may be promoted by any one who brings the facts before the Council. The board itself may start the inquiry of its own mere motion. Suppose it does so, and directs its officer to bring the facts before it: does it lose its powers on the ground that it is the prosecuting body? If not, how can the fact that one or two of those who sat upon the inquiry had indirectly something to do with starting the inquiry, invalidate their finding upon it? *Reg.* v. *Handsley* (3), and the cases there referred to, especially *Reg.* v. *Meyer* (4), are in our favour. If you can go behind the corporate body at all, you can go only to those who had a part in the management of it, not to every member. Where there is no pecuniary interest, a mere case of alleged bias is insufficient. There must be a substantial interest, likely to cause a bias: *Reg.* v. *Farrant* (1); *Reg.* v. *Rand* (2); *Reg.* v. *Dean and Chapter of Rochester* (3). The general body of the members had no power of directing or managing such an inquiry as this; the sole discretion was vested in the Council. It must also be remembered that it was the object of the Union to defend or protect duly qualified practitioners as much as to suppress unqualified practitioners; so that these two gentlemen were as much interested in defending the Plaintiff as in censuring him: *Reg.* v. *Pettitmangin* (4); *Reg.* v. *General Council of Medical Education and Registration* (5).

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(1) 4 Q. B. D. 332.
(2) 6 Q. B. D. 168.
(3) 8 Q. B. D. 383.
(4) 1 Q. B. D. 173.

With respect to the inquiry itself, the decision of the Council is not a subject of appeal to this Court, no *mala fides* or unfairness having been shewn in the proceedings: *Ex parte La Mert* (6); *Allbutt* v. *General Council of Medical Education and Registration* (7). This Court could not form a correct judgment on the matters in dispute, for it can only act upon legal evidence; whereas the Medical Council is not able to administer oaths, and proceeds on statements, facts, and considerations which this Court could take no account of.

Sebastian watched the case for the *Medical Battery Company* and *C. B. Harness.*

Rigby, in reply.

1889. Dec. 21. COTTON, L.J.:—

This is a motion by way of appeal from Mr. Justice *North* to restrain the Defendants, who are the *General Medical Council*, from acting on the resolution at which they arrived, which was that the name of the Plaintiff be struck off the register of medical practitioners; and to prevent them from publishing the resolution at which they arrived.

The *General Medical Council* is a body which is formed under 21 & 22 Vict. c. 90, which Act was passed for the purpose of enabling persons requiring medical aid to distinguish qualified

(1) 20 Q. B. D. 58.
(2) Law Rep. 1 Q. B. 230.
(3) 17 Q. B. 1.
(4) 9 L. T. (N.S.) 683.
(5) 30 L. J. (Q.B.) 201.
(6) 4 B. & S. 582.
(7) 23 Q. B. D. 400.

from unqualified practitioners. It is a body partly composed of medical men who are named by certain public bodies, partly of persons elected by the general body of qualified medical men in the country, and partly of persons named by the Queen. The Act required, and for the first time required, that there should be a register; and those only who are entered on the register can sue for and obtain payment of any money due to them for medical attendance or medical fees; and then powers are given to this body by various sections of which sect. 29 is the first and the most important one: "If any registered medical practitioner shall be convicted in *England* or *Ireland* of any felony or misdemeanour, or in *Scotland* of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." And that was what was done in this case by the *General Medical Council.* There is another clause, clause 40, which I ought to refer to, because it was a good deal referred to in argument. It enables criminal prosecutions to be taken against persons who falsely pretend to be registered practitioners, but the proceeding taken in this case was not under the powers of that last section, because Dr. *Leeson* was on the register at the time when this order was made by the *General Medical Council,* and was properly on the register.

Now, there have been a good many points argued here; and the first was that the matter in respect of which the *General Medical Council* here adjudicated or decided was not a matter within the powers given to them under sect. 29; and for that purpose the charge made against him, and which was brought to his notice by writing, according to the practice of the *General Medical Council,* was referred to, and it was as follows: "You, being a registered medical practitioner, do act as cover of, or by your presence, advice, and assistance, do enable one *Cornelius Bennett Harness,* an unqualified person, to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified, under the style of the *Medical Battery Company, Limited,*. . ." I need not read more. It was said that there was nothing contained in this complaint which would justify the *General Medical Council* in exercising the powers given to them by sect. 29, and there was a good deal of verbal criticism ably pressed upon us as to the effect of what is said in the notice. It was said that there is no allegation that Mr. *Harness* is practising as if he were a duly qualified medical man. It only says, "as if he were duly qualified under the style of the *Medical Battery Company*," and that all that Dr. *Leeson* was supposed to have done was that he assisted him to represent himself as a medical electrician. I cannot read it in that way. We know what a duly qualified medical man is in the Act. A person is duly qualified if he is on the register, and in that respect duly qualified to obtain the benefit of the Act as regards the privileges which are conceded to those medical men who are on the register; and I have no doubt that this notice does state that which would justify the *General Medical Council* if they were satisfied that it was supported by the facts in coming to the conclusion that an offence had been committed, coming within the words of the Act, "infamous conduct in any professional respect." That, in my opinion, is the true construction of the words of the charges which are made against him. And it was found that he had been guilty of the acts charged against him, and there was a direction to erase his name from the register.

There has been here a good deal of question as to what took place on the inquiry, and we have had the evidence which was before the *General Medical Council* brought before us. In my opinion it would be wrong to consider whether the *General Medical Council* arrived at a right conclusion on the evidence which was brought before them. The *General Medical Council* cannot, strictly speaking, take evidence. They cannot take evidence on oath. They cannot take evidence which we as lawyers have to consider as evidence. They have statements made before them in support of any complaint which is made, and also they have statements made on the other side by the medical man against whom the complaint is made, and if it is once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given to them by sect. 29, then I think we ought not to look at the evidence or

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in any way consider whether they have arrived at a right conclusion. Of course, if it was alleged and proved before us that they had acted corruptly, if it was proved that there was no statement made before them on which they could reasonably and honestly arrive at the conclusion at which they did arrive, then I think we ought to consider it to see whether the fact that there was no statement which could justify the conclusion was such evidence as, if not displaced, would lead us to the conclusion that the Council had not acted honestly with respect to the charge brought before them, but had acted from some other motive. But although there were some allegations in the affidavit of the Plaintiff in this case that there was prejudice against him, that point was not pressed upon us at all by counsel, nor was it in any way supported by anything which was brought before us. Dr. *Leeson* seems to have had a most perfect consideration of his case. The complaint was brought forward in the ordinary mode required by the rules and regulations of the *General Medical Council.* He was there; he was represented by his solicitor, and he brought his own witnesses—that is to say, those who with him were to make statements in support of his contention that in his conduct he had done nothing which was infamous in a professional respect; and everything was heard, most fully heard, and considered, and then the Council arrived at the conclusion at which they did arrive. In my opinion, that being so, we cannot consider whether they are right or wrong. That must be left to them.

In my opinion, therefore, the first ground which was taken in support of this application fails, because I think there was a charge which justified the *General Medical Council* in making the inquiry under sect. 29, and there was no reason for suggesting that the proceedings were improperly conducted by them.

But then there was another point raised which occasioned rather more doubt, and which was this. It was suggested that this order made by the *General Medical Council* must be considered as made by a non-competent tribunal; for it was said that, taking the Council as acting judicially, it was so constituted on this particular occasion that any order made by it ought, having regard to the decided cases, to be considered as a nullity. Now this appeared, that the complaint against Dr. *Leeson*—I will not call it indictment—was brought in the name of the *Medical Defence Union*, and it turns out when attention is called to the matter that two of the members of the Council who were present when the case of Dr. *Leeson* was considered were members of the *Medical Defence Union*; and it was said that they are to be considered in the light of prosecutors, and that as they were prosecutors they could not also sit as judges in the matter. It was, therefore, contended that any decision which the Council arrived at, where these two members who were incompetent to act as judges in the matter were present, must be considered as a nullity.

Of course, the rule is very plain that no man can be plaintiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that particular case—either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made. To my mind it is clear here that the *General Medical Council*, in respect of the complaint against Dr. *Leeson*, were acting judicially. They were not in the ordinary sense judges, but they had to decide judicially as to whether or not the complaint against Dr. *Leeson* was well founded; and they could, if they found it was well founded, make an order which would be of great importance to him and remove him from the register, with very serious consequences. But then we have to consider this. Ought these two gentlemen, Mr. *Teale* and Dr. *Glover*, to be considered as complainants in this case?

In considering this, we must look a little at the *Medical Defence Union*. The *Medical Defence Union* was a company limited by guarantee under the Act of 1862, and one of the objects was "(1) to support and protect the character and interests of medical practitioners practising in the *United Kingdom*," and then "(2) To promote honourable practice and to suppress or prosecute unauthorized practitioners." Then they are "to advise and defend, or assist in defending, members of the Union in cases where proceedings involving questions of professional principle or otherwise are brought against them." So that it was not only to prosecute those who offended against the Act but to defend

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those against whom charges were brought unreasonably. Then, if we look at the articles, we find this—that there was a Council, and the Council practically had all the powers of the company which formed the Union, except in one respect—they could not institute prosecutions against any one who was acting in violation of the law without a vote of a general meeting.

One of the articles was as follows: "The objects for which the Union is established shall be carried out in the manner provided by these articles, provided that the second of the objects of the Union as there set forth, so far as relates to the suppression or prosecution of unauthorized practitioners, shall not in any case be acted upon without the sanction of a unanimous resolution of the Council confirmed by a majority of members present and voting at a general meeting." But we are not now considering a prosecution under the Act, and, except in that respect, there is no limit to the power of the Council, who can do everything which is not expressly or by Act of Parliament required to be done by the whole body. Neither Mr. *Teale* nor Dr. *Glover* were members of the Council, they were members of the Union by subscribing 10*s*. a year and by giving a guarantee, the amount of which we do not know, which was to provide any expense which would be necessary in order to carry out the objects of the association. The powers of the Council are referred to in article 36:—"The management of the business and the control of the Union shall be vested in the Council, who, in addition to the powers and authorities by these Articles expressly conferred on them, may exercise all such powers, and do all such acts and things as may be exercised or done by the Union, and are not hereby or by statute expressly directed or required to be exercised or done by the Union in general meeting."

Now this complaint made against Dr. *Leeson* was a complaint brought forward by the Council to which neither of these two members of the *General Medical Council* belonged. They were not upon it, and they could not, having regard to the articles, exercise any control or give any direction as to what should be done by the Council in bringing forward this complaint. Then, are they, as members, in any way interested? The expenses of this complaint could not be thrown by the *General Medical*

Council on Dr. *Leeson*, the person complained of. They had no power to give any costs, and therefore, whatever might be the result of this complaint made against him, it could not in any way affect the liability of Mr. *Teale* and Dr. *Glover* to contribute to the expenses of this proceeding. Then as regards the question whether they are to be considered as complainants here, we ought to look to substance, and not, because this complaint is brought by the Council in the name of the Union, to say that a person, a member of a union, who has nothing to do and can have nothing to do with bringing forward this complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward this complaint. The term "prosecutor" is sometimes objected to, but I use it for the sake of simplicity. Therefore it cannot be said that these two members were incompetent to act because they were adjudicating upon a complaint brought forward by themselves; and, as I have already shewn, there can be no pecuniary interest and no bias in that respect from any pecuniary liability which was thrown upon them or anything of that kind. Whichever way it was determined, their liability as to contributing to the expenses would be just the same. I may also observe that as regards the objects of the Union (I give no opinion as to whether it is desirable to form such unions), the objects are just as much to defend those who are improperly attacked as to bring before the *General Medical Council* any question which may reflect on the conduct of any member of the profession, so that on that ground they are not to be considered as complainants here—as persons who are bringing forward this charge—and there was hardly any contention that their position as members of the Union did actually involve a bias which would prevent them from adjudicating on this case.

Numerous cases were cited, but in the view which I take of the question before us, it is only necessary to advert to one which probably is the strongest in favour of the Appellant here: *Reg.* v. *Allan* (1). There certain gentlemen, riparian owners and owners of salmon fishing, and some who were outsiders, formed themselves into a body not in any way incorporated, all of

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(1) 4 B. & S. 915.

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whom apparently would have equal power, and there was a committee formed which was a committee to direct prosecutions. Three magistrates were sitting on the bench when a question was brought before them, and they were members of this association. One of them was a member of the committee and had directed the prosecution. There was no doubt, therefore, that he was a prosecutor in the matter which was brought before the magistrates for decision, and therefore, having regard to the principle laid down, the conviction was bad. But the other two had nothing to do with that committee, and were only members of the association; and that was the principal point relied upon here. But the Lord Chief Justice *Cockburn* no doubt does use language which would seem to shew that, even if only those magistrates who were members of the association and not on the committee had been on the bench, the conviction would have been bad. What he said was this (1): "Certain members of that association were present as justices, and took part in this conviction; they were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Well, I myself do not think that the language of Judges ought to be taken without reference to the facts of the case, and although he did use that large expression, yet Lord *Blackburn*, who was on the bench too, and Mr. Justice *Mellor*, did not use language which can be even tortured into saying that if any member of the association had been on the bench at the time that would have vitiated the proceeding. What Lord *Blackburn* said was this (2): "One of the justices who joined in the conviction, being a member of the committee of the association which instituted the proceedings, was one of the prosecutors. There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which institutes the prosecution must not act as judges upon it." There I think he puts it that the conviction was bad, because one member of the committee, who were actually prosecutors, was sitting on the bench at the time, and Mr. Justice *Mellor's* language, I think, fairly interpreted, leads to the same conclusion; but even if the Lord Chief Justice did intend by the language he used to say that the conviction would have been bad if the Court included any one of the members of the association who had nothing to do with the prosecution, and could not have, and who had not been on the committee, I should not follow him in a case like this, where neither Mr. *Teale* nor Dr. *Glover* had or could have any voice at all in this prosecution, or, on the evidence, knew anything at all about it till the matter was brought before them as members of the *General Medical Council.*

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(1) 4 B. & S. 922.

(2) 4 B. & S. 924.

In my opinion this objection, which is a most serious one, cannot prevail, and we ought to hold that Mr. Justice *North* was right in refusing the injunction.

BOWEN, L.J.:—

As to the first point raised by the appeal I shall say very little in addition to what the Lord Justice has already stated. These proceedings were in the nature of judicial proceedings, although the forum is a domestic one, and although the evidence taken before such forum differs in many respects from evidence which is adduced in a Court of Law, and in particular in the all important respect that it is not given upon oath. The only thing which the Courts can investigate when proceedings of the *General Medical Council* of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction. The jurisdiction is defined by the statute. There must be an allegation before the *General Medical Council* of infamous conduct in some professional respect, and adjudication must be arrived at after due inquiry. The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen that those conditions have been fulfilled by the inquiry and by the tribunal which institutes it. The functions of the Court of Law are at an end. It appears to me that we have no power to review the evidence any more than we have a power to say whether the tribunal came to the right conclusion. If, indeed, it could be shewn that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to shew that the inquiry had not been a due inquiry; but if there is no blot of that kind upon the proceedings, the jurisdiction of the domestic tribunal which has been clothed by the Legislature with the duty of discipline in respect of a great profession must be left untouched by Courts of Law. It appears to me for these reasons that the view which the Lord Justice *Cotton* has expressed is the sound one, and I entirely concur with it.

Next comes a very serious question, whether or no the tribunal which adjudicated in respect of the Appellant's conduct was, in respect of two of its members, rendered incompetent by the fact that they had taken part as accusers before the Council of the person upon whose conduct they were adjudicating. As the Lord Justice has said, nothing can be clearer than the principle of law that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial judge. If he is an accuser he must not be a judge. If he has a pecuniary interest in the success of the accusation he must not be a judge. Where such a pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a judge. But it must be in all cases a question of substance and of fact whether one of the judges has in truth also been an accuser. The question which has to be answered by the tribunal which has to decide—the legal tribunal before which the controversy is waged—must be: Has the judge whose impartiality is impugned taken any part whatever in the prosecution, either by himself or by his agents? I think it is to be regretted that these two gentlemen, as soon as they found that the person who was accused was a person against whom a complaint was being alleged by the Council of a society to which they subscribed, and to which they in law belonged as members, did not at once retire from the Council. I think it is to be regretted, because judges, like *Cæsar's* wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the *General Medical Council* will think it reasonable advice that those who sit on these inquiries should cease to occupy a position of subscribers to a society which brings them before the Council. But having said that, I come back to the point which we have to decide, whether these two gentlemen took any part whatever in the prosecution either by themselves or by their agents. It appears to me, in spite of the cloud which the ingenuity of the Appellant's Counsel raised upon the point, that the true answer must be here upon the facts—and it is a question of fact—in the negative. I think, although they were members of the incorporation whose Council brought this complaint before the *General Medical Council*, they did not themselves take any part and could not have taken any part whatever in the prosecution, and that the prosecution was not conducted really by the Council of the Union as their agents. The Council of the Union was supreme in the matter, and I think that they stand clear, upon the facts being investigated, of all suspicion whatsoever.

For those reasons, treating the latter part of the case as one which depends upon an inference of fact, and regretting as I do that there should be colour for the suggestion that has been made, and that a controversy should accordingly have arisen which required to be carefully considered, and with the care which we have brought to bear upon it, nevertheless I think that as a matter of substance and of fact these gentlemen were not accusers on this particular occasion.

The appeal, therefore, in my judgment, must be dismissed with costs.

FRY, L.J.:—

Two questions have been argued before us. The first was a question whether the charge which was laid before the *General Medical Council* was one which was within the jurisdiction of that Council. Now with all that has been said by my learned Brothers on that part of the case I entirely concur; I shall add nothing to what they have so fully and clearly expressed.

Then comes the second question, whether having regard to the fact that two members of the Council were subscribers to what is known as the *Medical Defence Union*, the Council as constituted was competent or incompetent to determine the charge. Now there, again, there are subordinate questions in which I entirely agree with my learned brethren. Like them, I cannot for one moment yield to the argument which was addressed to us by the leading Counsel for the *General Medical Council* that they were not acting judicially in the performance of their duties on the occasion in question. The nature of the proceeding and the effect of the proceeding seem to me to be very strong to shew that it must be judicial, because the result was to deprive Dr. *Leeson* of rights which before that were vested in him as a duly qualified medical man on the register of the Council. Further than that, the language of the statute, if it be necessary to refer to that, is in my judgment equally clear; it requires a due inquiry. It requires a judgment. It requires that that judgment shall find him guilty. Now "inquiry" and "judgment" and "guilt" are all words which express and which are relevant to judicial proceedings, and therefore, although this body proceeds by different rules of evidence from those on which the Courts of Law proceed, I cannot for a moment doubt that the Council were proceeding judicially; nor can I help adding that the manner in which the Council has proceeded on this inquiry, as on all other inquiries, shews that the Council are fully aware that they are performing judicial duties, and that they endeavour to perform them in a very admirable manner.

Then it was urged before us that the *Medical Defence Union* were not in fact complainants. It was said that the Council could proceed without any prosecutor or person acting before it, that they might proceed *mero motu*. That is quite true, but it is equally true that in this case they did not proceed *mero motu*, but they proceeded in this manner. They allowed the solicitor and the honorary secretary of the *Medical Defence Union* to appear before them in the character of complainants, a course which seems to me to have been a very convenient one to pursue; and it is not unworthy of remark that at the very same meeting of the Council at which these proceedings were taken against Dr. *Leeson*, rules in respect of the procedure at such inquiries were passed by the Council, which divided them into two classes of cases. One of these classes was where the inquiry is brought before the *General Medical Council* by a complainant, and the complainant appears personally or by counsel or solicitor; then a certain order of procedure was enacted, and that order of procedure followed very nearly the procedure before a Court, and it gave the complainant an opportunity to state his case, and produce his proofs; then the accused was to be invited to state his case and to produce his proofs; and then there was an opportunity given for a reply in certain cases. The second class of cases was where no complainant appeared. There the Council proceeded simply by reading the complaint and calling on the accused practitioner to state his case and to produce his evidence. It is evident, therefore, that the *Medical Defence Union*, either as a whole or by their executive, were proceeding as complainants and as *quasi* prosecutors in this inquiry. No doubt the *Medical Defence Union* acts through its Council, through its executive body, and this proceeding was taken by the executive body, and they were represented, as I have already stated, by their solicitor and their honorary secretary. They acted in fact as prosecutors, producing the evidence and stating the case, and urging what was to be said for the prosecution or *quasi* prosecution.

Now, to that Union two of the members of the *General Medical Council* which sat upon this case, and who, therefore, took part in this decision, were subscribers, and it must be taken that this prosecution—I call it a prosecution for the sake of brevity—this proceeding was within the objects of the Union. It appears to me that subscribing to a Union of this description implies two things. It implies a general sympathy with the objects of the

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Union, and it implies, secondly, a confidence in the discretion of the executive body who have to carry on the business of that Union. No doubt the amount of confidence and the amount of sympathy may vary in different cases, and from time to time, with the same subscribers, but that is the natural conclusion I think one arrives at when one finds a person subscribing to an association for carrying on prosecutions. Now, that in my opinion makes the subscriber to an association of this kind what has been called a virtual prosecutor—of course he is not an actual prosecutor; he is not before the tribunal *in propriâ personâ,* he has not even given instructions to the solicitor who appears, but he has shewn his sympathy with and his confidence in that body who are acting in this respect. I cannot think that a body of subscribers to a Union of this description could form a satisfactory body of judges to determine on proceedings taken by the Union itself. I cannot shut my eyes to the fact, which Judges know as well as everybody else, that there are in this country numerous associations formed for the purpose of carrying on prosecutions in respect of alleged violations of the law of various kinds. They may be sometimes in respect of violations or alleged violations of rights of fishery in a river, as in the *Tees Case,* or they may relate to violations or alleged violations of the laws which restrain cruelty towards animals, or to violations or alleged violations of the ecclesiastical laws. Subscribers to those associations indicate their sympathy with the general proceedings of the body in carrying on those prosecutions, and I think they come within the description which has been given of virtual prosecutors.

To my mind this point is determined by authority. I do not say authority binding on us, but authority which I think deserves the utmost respect and consideration. I mean the case to which Lord Justice *Cotton* has referred of *Reg.* v. *Allan* (1). In that case there was a voluntary association of persons which consisted of two classes—ordinary members who were the owners of riverside property or occupiers of the rights of fishing in the *Tees* and its tributaries; secondly, honorary members who might be desirous of promoting the objects of the association by con-

(1) 4 B. & S. 915.

tributing to its funds, and who were, as I understand, not riparian proprietors or owners of rights of fishing in the *Tees*. That body acted, as most of these bodies do, through a committee, and that committee was not only to make bye-laws and rules and regulations, but they were the persons to engage and dismiss watchers, and in the event of proceedings under the Act being considered necessary, they—that is, the committee—were to instruct the secretary to enforce its provisions, and the secretary and treasurer were, subject to the approval of the committee, to determine what proceedings should be taken against any person acting in contravention of the law. The ordinary members, therefore, and the honorary members had nothing whatever to do with instituting the prosecutions or appointing watchers. The person who laid the information in that case was a watcher of the association, therefore engaged and liable to dismissal not by the general body but by the committee. The magistrates who sat on the bench to hear that complaint were three. Mr. *Allan* was an ordinary member and the owner of property having a frontage to the river; Mr. *Smith* was not only an ordinary member but he was an active member of the committee, and had been concerned in a resolution which authorized the committee to take proceedings for the recovery of such penalties as in their opinion had been incurred at the defendant's locks, and, lastly, Mr. *Pease*, who was not an ordinary member, but only a subscribing member of the association. Those were the three justices.

Now in what way did the Court deal with the application to quash the conviction on the ground of the magistrates being the virtual prosecutors? The Lord Chief Justice *Cockburn* said (1): "It is impossible to hold consistently with the principles which have been established by decided cases, and are founded in the very essence of justice, that these magistrates were competent judges upon the occasion in question." Observe, he does not hold that one magistrate is disqualified, but he holds that all three were disqualified according to the essential principles of justice. Then he says: "Certain members of that association were present as justices"—again dealing with them all—"and took part in this conviction; they were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Then Lord *Blackburn*—Mr. Justice *Blackburn* as he then was—in my view, notwithstanding what has been said by Lord Justice *Cotton*—took the same view. He deals no doubt in the first place with the case of Mr. *Smith*, who was a member of the committee, but he goes on to add this: "There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which institutes the prosecution must not act as judges upon it." In other words, he says neither an ordinary nor an honorary member of this association can act as judge upon the matter. Every subscriber to that association appears to me in the view of these two learned Judges to have been disqualified from sitting as judge or acting as judge on that complaint.

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(1) 4 B. & S. 922.

I think, therefore, that that is a decision which in point of substance and principle applies to the present case. Of course it is not binding upon us, but in my view that decision is right, and I think that it ought to be upheld and applied to the present case. I think that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual bias or prejudice of the judges, but that they shall be free from the suspicion of bias or prejudice: and I do not think that subscribers to associations for the purpose of carrying on prosecutions can be said to be free from suspicion of bias or prejudice in the case of prosecutions instituted by the associations to which they subscribe. It is needless for me to disclaim any intention, in arriving at that conclusion, of holding that the two gentlemen in question were in fact influenced by any bias. That appears to me a point which is not really open to us, because I put my decision on the ground of public policy, and I disclaim any right to inquire whether in fact they were or they were not biased. I need hardly say that I do not believe they were.

Lastly, it was urged that the case I have referred to is not in point, because there the association was not an incorporated one, and in the present case it was incorporated. That, in my judgment, has nothing to do with the case. Corporation or non-corporation is quite immaterial in considering the operation upon a

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man's mind of the fact that he is a member of a Union for the purpose of carrying on prosecutions. I think, therefore, that we should be misled by a trivial and immaterial difference if we gave any effect to that. If the matter, therefore, had rested with me, I should have held that the decision of the *General Medical Council* in this case was invalid, and that the Council as constituted on the occasion in question was not competent to decide on it, and in so doing I think that I should best maintain the dignity and, therefore, the usefulness of the *General Medical Council*. My learned brethren are of the opposite opinion, and therefore this appeal will be dismissed with costs.

Solicitors: *R. Furber; Farrer & Co.*

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[1886 G. 1292.]

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Practice—Time for Appeal—Order in Chambers—Motion to Discharge Final Order—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 50 [*Revised Ed. Statutes, vol. xvii., p.* 86]*—Rules of Supreme Court,* 1883, *Order* LVIII., *r.* 15*—Originating Summons—Mortgage—Priority—Rules of Supreme Court,* 1883, *Order* LV., *rr.* 3, 5 *A.*

A motion to discharge or vary a final order made in Chambers must be brought within twenty-one days.

In re Johnson (1) approved.

Where a party moved to discharge a final order made in Chambers after the expiration of twenty-one days, and the Judge refused to hear it because it was too late, *quære,* whether the motion was made within the terms of the 50th section of the *Judicature Act,* 1873, so as to give the party a right to appeal.

The procedure by originating summons is only intended for the decision of simple questions between the plaintiff and defendant. Therefore, where a mortgagee had taken out an originating summons for foreclosure or sale under Order LV., r. 5 A, the Court refused to decide the question of priority between two mortgagees.

THIS was an originating summons taken out by the *Real and Personal Advance Company,* as Plaintiffs, transferees of a mort-

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(1) 42 Ch. D. 505.

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gage, against *William Michell* and *Fanny Michell*, his wife, the mortgagors, and *Walter Giles* and *Philip Giles*, trustees of the property mortgaged, as Defendants. The summons asked for an account of rents from the two last Defendants and payment to the Plaintiffs.

The trustees appeared on the summons, and admitted that they had a small sum in hand on account of rents; but they alleged that they had a mortgage on the interest of one of the *cestuis que trust* in the property, for which they claimed priority to the Plaintiffs' mortgage.

On the 26th of July, 1889, an order was made by the Judge in Chambers on the summons, directing the usual mortgage accounts and foreclosure in case of default in payment of what should be found due, against the first two Defendants, and dismissing the summons with costs against the last two Defendants.

On the 18th of November, 1889, the Plaintiffs gave notice of motion to the Defendants *Walter Giles* and *Philip Giles* that the order in Chambers of the 26th of July, 1889, might be reversed so far as it dismissed the summons against them with costs, and that they might be ordered to pay a sum of money mentioned in an affidavit and the Plaintiffs' costs.

The motion was heard before Mr. Justice *North* on the 22nd of November, 1889.

D. L. Alexander, for the Respondents:—

There is a preliminary objection that the motion is out of time. Applications of this nature are treated, so far as the time within which they must be brought, on the same footing as appeals from interlocutory orders, that is to say, they must be brought within twenty-one days. If that limit is not imposed no other limit short of a year can be. If a year were the limit, there would be two years for an appeal to the Court of Appeal from Chambers. In *In re Lewis* (1) the Court of Appeal held that twenty-one days was the limit; that was a case of an interlocutory appeal; but it was evidently the opinion of the Court that a final order in Chambers would be subject to the same rule. And in *In re Johnson* (2) Mr. Justice *Kay* laid down the rule to that effect in so many words.

(1) 31 Ch. D. 623.

(2) 37 W. R. 765, since reported in 42 Ch. D. 505.

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Eustace Smith, for the Plaintiffs :—

None of the cases really decide the question. Even in the case of *In re Johnson* (1) Mr. Justice *Kay* thought that the order that had been made in that case was interlocutory. The order in this case is final, there being no express provision; it is just and logical that a party should have the same time to bring what is practically an appeal from a final order as the rules give in cases of appeals to the Court of Appeal on final orders.

NORTH, J. :—

Mr. Justice *Kay* has laid down a rule which seems to me strictly in point. I should not think it right to depart from any practice that exists. In a case of this sort it is far more important that it should be known what the rule is than that the rule should be one way or the other; and finding a case deciding what the rule is, I think I ought to follow it. If the rule has been wrongly laid down the Court of Appeal may establish the right rule, which I should be prepared to accept. I feel bound by the decision of a Court of co-ordinate jurisdiction, and I refuse the motion.

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The Plaintiffs appealed both from the order of the 26th of July and from the order refusing the motion to discharge it. The appeal was heard on the 28th of January, 1890.

Eustace Smith, for the Appellants.

D. L. Alexander, for the Respondents :—

We take the preliminary objection to the appeal from the order of the 26th of July that the conditions imposed by the *Judicature Act,* 1873, s. 50 (2) have not been complied with. The Appel-

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(1) 37 W. R. 765.

(2) "Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and

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lants did not make a motion before the Judge, for their notice was too late; nor did they obtain a certificate or leave to appeal from the Judge. If they now ask this Court for leave to appeal we contend that there is no ground for it, as the practice was settled by *In re Johnson* (1), where Mr. Justice *Kay* decided that the time allowed for moving to discharge a final order in Chambers was twenty-one days. If a different rule were allowed with regard to final orders in Chambers, an appellant would have practically two years within which to appeal to this Court.

Eustace Smith, for the Appellants:—

There is no rule either in the *Judicature Acts* or in the General Orders regulating the time for moving to discharge an order in Chambers. It was decided in *Heatley* v. *Newton* (2) that motions to discharge interlocutory orders were to be limited to twenty-one days by analogy to Order LVIII., rule 15, which regulates appeals to this Court from interlocutory orders; but it was never decided until *In re Johnson* that the same rule should apply to final orders. That decision has never been affirmed by this Court, and it is not a reasonable rule; if the analogy of appeals to this Court be taken, it ought to be a year. That case was not decided till shortly before the motion was made in this case and had not been reported in the LAW REPORTS. If, therefore, the Court should be of opinion that Mr. Justice *North* was right in refusing to hear the motion, we ask for leave to appeal under the 50th section of the *Judicature Act*, 1873, having regard to the fact that the delay was caused by a mere slip and to the importance of the questions of practice on which it is desired to take the opinion of the Court.

D. L. Alexander, in reply:—

The fact that there has been an accidental mistake in practice is no reason for giving special leave to appeal: *International Financial Society* v. *City of Moscow Gas Company* (3).

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no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal."

(1) 42 Ch. D. 505.

(2) 19 Ch. D. 326.

(3) 7 Ch. D. 241.

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COTTON, L.J.:—

The preliminary objection taken to this appeal raises a point of some importance. An order was made by the Judge in Chambers, and he wished to have the question further argued; and accordingly a motion was made before him in Court to discharge or vary the order. That was not an appeal, but only an application for rehearing before the same Judge. The notice of that motion was given more than twenty-one days after the date of the order. I think that was wrong. It has been established for some time that the time for giving notice of a motion to discharge an interlocutory order made in Chambers, following the analogy of interlocutory orders made in Court, is limited to twenty-one days; but it was not determined before the decision in *In re Johnson* (1) that the same rule was to apply to motions to discharge final orders. In my opinion it is right that the same rule should apply to both kinds of orders. It is not, as I have said, an appeal, but only a motion before the Judge who has expressed a desire to hear the matter over again more fully in Court, and consequently an application is made before him under sect. 50 of the *Judicature Act*, 1873, to discharge or vary the order which has been made in Chambers. I think, therefore, Mr. Justice *North* was right in deciding that he could not hear the motion after twenty-one days had expired. But the limitation of time was doubtful before the decision in *Johnson's Case* had been reported; and this application is, in fact, made under sect. 50 of the *Judicature Act*, 1873, by the latter part of which a discretion is given to this Court as to giving special leave to appeal.

The section says, "No appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal." I am not quite satisfied that the condition imposed by the section as to making a motion before the Judge has not been performed in this case, although by a blunder it was made in such a way that the Judge could not hear it. But an appeal can by special leave be heard without a certificate from the Judge and without a motion before him to discharge the order. I think there are circumstances in this case under which we ought to give special leave to appeal even though the conditions imposed by the section have not been performed, having regard to the doubt as to the practice, and the absence of any positive rule of the Court as to the time for making the motion; and also having regard to the importance of deciding the doubtful point whether the questions at issue between the parties can be decided upon an originating summons without any action being brought.

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(1) 42 Ch. D. 505.

I entirely agree with Mr. Justice *Kay*, that motions to discharge final orders ought to be brought within twenty-one days so as not to keep alive unreasonably the right to bring an appeal for a longer period than is allowed for appeals when made in Court; and in laying down the rule that notice of motion must be given within twenty-one days, I wish it to be understood that it must be followed in future; and I do not say what course we should think it right to take in any future case which may come before us, in which there has been no certificate and no effectual motion has been made to discharge or vary the order in Chambers.

Lindley, L.J.:—

I agree. The difficulty here arises from the fact that there is no General Order as to the time within which a motion to discharge an order in Chambers must be made. With respect to final orders the limit of time was not decided till *In re Johnson* (1), and that case did not appear in the Law Reports till the month of December in last year. That being so, I think the course followed by Mr. Justice *North* was the proper one. I think Mr. Justice *Kay* was right in holding that notice of motion ought to be given within twenty-one days. There is no rule to that effect among the General Orders, but that limit of time has been got at by a process of reasoning which appears to me satisfactory. If that is so, it follows that no such application as is required by sect. 50 of the *Judicature Act* has been made in this case. But, at the same time, the point of practice was a new one. It is not like a case in which there is an existing rule and a blunder is made in construing it; and I do not think any one

(1) 42 Ch. D. 505.

is to blame for arriving by reasoning and analogy at a different conclusion from that which we have arrived at. I think, therefore, this is a case in which it is right for us to use the powers which are given us by sect. 50, and to allow this appeal to proceed.

LOPES, L.J.:—

I agree with Mr. Justice *Kay* that the rule that motions to discharge final orders must be brought within twenty-one days is a salutary rule. But here I think there are circumstances which justify us in giving the Appellants special leave to appeal under sect. 50. At the time when this case came before Mr. Justice *North* there was no positive rule of any kind and no settled practice bearing on this particular point.

Eustace Smith, for the Appellants:—

We appeal against the order made in Chambers, on the ground that the Judge ought not to have dismissed the summons as against the trustees, but ought to have decided the question of priority between the mortgages of the Plaintiffs and the trustees. This he had jurisdiction to do although the proceedings had been commenced by originating summons. Under Order LV., rule 3 (*a*) and (*g*), questions may be decided between trustees and *cestuis que trust*; and under rule 5 *A* orders for foreclosure and redemption may be made. If the Court can make an order for foreclosure and redemption it must determine questions of priority between mortgagees. The trustees admitted that a small balance was due from them. We were therefore entitled to some decree against them.

COTTON, L.J.:—Why was no order made for payment of this balance to the Plaintiffs?

D. L. Alexander, for the Defendants:—

The Plaintiffs declined to accept the balance without having the priority of their mortgages decided. [He was not called on to argue on the appeal.]

COTTON, L.J.:—

This is an appeal brought by special leave, without a certificate by the Judge, from an order made by Mr. Justice *North* in Chambers, dismissing so much of an action commenced by originating summons as appeared to have the object of settling the question which had been raised by the Defendants, the trustees, whether they had priority for their mortgage over the Plaintiffs' mortgage. The Defendants who claim are trustees but their claim to the mortgage is not as trustees, but as mortgagees under a contract between them and one of their *cestuis que trust*, independently of their position as trustees. There may be a question as to the validity of their mortgage having regard to their position as trustees, but the question of priority does not arise in the administration of the trust. The Judge decided either that he had no jurisdiction to decide the question of priority of the mortgages upon an originating summons, or, that if he had, it was not proper to decide it in an action commenced in that manner. I agree with him. In my opinion the Court has no jurisdiction to decide such a question on an originating summons; but I decidedly hold that, if it has jurisdiction, it is not proper to decide it upon an originating summons. Under the rules the Court has jurisdiction only to decide certain special matters on an originating summons, and the question whether the Court has jurisdiction in this case depends upon whether the rules give it power to decide the questions at issue here. I cannot find in Order LV., rule 3, anything justifying such a point as this being determined upon an originating summons. The Appellants relied on clause (*g*), but that clause only relates to questions arising in the administration of an estate as between trustees and their *cestuis que trust*. It was intended, so far as we can judge, to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question. Rule 5 *A* was also referred to, and it was argued that in order to work out a judgment for redemption or foreclosure effectually it was often necessary to decide on the priority of mortgages, and therefore that the rule empowers that to be done. I do not agree with that. It is true that questions involving priority do often arise in working out redemption or foreclosure, and if there is an action commenced in the usual way, the Court has no difficulty in dealing with them; but if the Plaintiffs choose to come to the Court upon an originating summons because it may be more convenient to them on the ground of saving expense or otherwise, yet if the relief claimed does not come within the terms of Order LV., there is no jurisdiction to give such relief. I am of opinion that it would be very wrong to decide such questions as this in these informal proceedings. This mode of procedure is fitter to decide matters which are not of an involved nature, and not questions which may require considerable discretion. In my opinion the decision of Mr. Justice *North* was right. With respect to the question of costs we cannot deal with that, as we have upheld his decision, and he has exercised his discretion concerning them.

The only point on which I have felt some doubt is whether it would not have been right to order the Defendants to hand over to the Plaintiffs the balance of rents admitted to be in their hands. The trustees were willing and offered to pay it; but the Plaintiffs, thinking some difficulty might be caused by this, considered it better not to accept the offer. That being so, I think there was nothing which the Judge could decide consistently with the opinion which he had expressed as to his jurisdiction.

The order was therefore right, and the appeal must be dismissed.

LINDLEY, L.J.:—

In this case an originating summons was taken out by mortgagees against Mr. *Michell* and his wife asking for foreclosure of their mortgage. That they have got under Order LV., rule 5 *A*, which was made in order to obviate the necessity of having recourse to the expensive procedure of an action for foreclosure or redemption. That judgment was almost a matter of course. But they added as Defendants to the summons two persons named *Giles,* who are trustees of the property mortgaged, and they asked against them a declaration of trust and an account of rents received by them. The trustees say they have a mortgage

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on the estate in priority to the Plaintiffs' mortgage. The Plaintiffs dispute the priority, and the point we have to decide is whether that is a question which is proper to be determined upon an originating summons. I do not say that the Court has not jurisdiction to decide this question. I am not sure that on a summons for administration of the trust there might not be an inquiry as to priorities under Order LV., rule 3 (*g*). But in my opinion Mr. Justice *North* was quite right in refusing to decide such a question as this upon an originating summons. The procedure on a summons is plainly laid down in the rules. By rule 10 of Order LV. there is a discretion given to the Judge to make an order or not for administration of a trust. Then by rule 7 the application is to be supported by such evidence as the Judge may require, which is generally affidavit evidence; and by rule 9 it shall be lawful for him to pronounce such judgment as the nature of the case shall require. This procedure does not seem applicable for deciding such a question as the present. A Judge may properly decline to decide a question of priorities between mortgagees on affidavit if the question turns on disputed facts. Therefore, if it is treated as a question of convenience or expediency, it would not be right to decide this point upon an originating summons, whether the Court has jurisdiction or not. I am of opinion that the Judge was quite right in his mode of dealing with the case.

LOPES, L.J.:—

The jurisdiction of the Court in proceedings commenced by originating summons is new and depends on the General Orders. I find nothing which gives jurisdiction to decide the question of priority of mortgages either in rule 3 or rule 5 *A* of Order LV. or elsewhere. I, therefore, agree that this appeal must be dismissed.

Solicitors for Plaintiffs: *Nye, Greenwood, & Moreton.*

Solicitor for Defendants: *J. Welman*, agent for *R. E. Geach, Guildford.*

M. W.

In re HARGREAVES.
MIDGLEY *v.* TATLEY.

[1889 H. 3684.]

C. A.
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KAY, J.
Dec. 5.
C. A.
1890
Jan. 29.

Will—Construction—Remoteness—Originating Summons—Rules of Supreme Court, 1883, *Order* LV., *r.* 3.

H. devised real estate unto and to the use of trustees in fee upon trust to pay the rents to her sister *M.* for life, then to *M.'s* children successively for their lives, and after the death of *M.* and her children to her sister *E.* for life, and then to *E.'s* children successively for their lives, and after the deaths of *M.* and *E.* and all their children to hold the property on such trusts as the longest liver of *M.*, *E.*, and their children should by deed or will appoint, and in default of appointment upon trust for the heir of the testatrix. *M.* and *E.* survived the testatrix. The longest liver of *M.*, *E.*, and their children left a will by which she purported to appoint the property. The heir-at-law of *H.* claimed the property as undisposed of. The trustees of the will of *H.* took out an originating summons to have it decided to whom they ought to convey the property.

Held, by *Kay*, J., that he could not try an equitable ejectment on originating summons, and that the summons must be dismissed.

Held, by the Court of Appeal, that the case was within Order LV., r. 3, and could be tried on originating summons.

At the request of the parties, the Court of Appeal consented to decide the construction of the will, and held that as the person to exercise the power of appointment was not necessarily ascertainable within a life or lives in being and twenty-one years, the power was void, and the property on the death of the survivor of *M.* and *E.* and their children went as undisposed of to the heir-at-law.

Avern v. *Lloyd* (1) overruled.

HANNAH HARGREAVES, by will dated the 24th of November, 1838, devised to *John Townsend* and *Henry King* certain specified freeholds, "To have and to hold the same unto and to the use of them, the said *John Townsend* and *Henry King*, and the survivor of them, and the heirs and assigns of such survivor upon the trusts, nevertheless, and to and for the several uses, ends, intents, and purposes thereinafter mentioned, expressed, and contained of and concerning the same." The trusts were to receive the rents and pay the residue, after deducting expenses, to her sister *Mary* for life, for her separate use, as therein mentioned, and after her decease "upon further trust to pay the residue of such rents to her oldest child during his or her life, and after the decease of such oldest child to the next oldest child during his or her life, and so on in succession to the next oldest child during his or her life, till all the children of my said sister *Mary* shall depart this life, and from and after the decease of my said sister *Mary* and all her children upon further trusts to pay the residue of such rents, issues, and profits" to the testatrix's sister *Eliza* for life for her separate use as therein mentioned, and after her decease to pay the residue to her children successively in the same way as to *Mary's* children. "And from and after the decease of my said sisters *Mary* and *Eliza* and all their children, upon further trusts that they, my said trustees, or the survivors of them, or the heirs or assigns of such survivor do and shall stand seized of the said freehold hereditaments and premises, in trust for such person or persons, in such parts, shares, and proportions, and in such manner and form, and under and subject to such powers, provisions, directions, limitations, and appointments as the longest liver of them, my said sisters *Mary* and *Eliza* and their children, shall, notwithstanding coverture, by any deed or deeds, instrument or instruments in writing, or by his or her last will and testament in writing, or any codicil or codicils thereto to be respectively duly executed and attested, direct, limit, or appoint, give, or devise the same, and in default of any such direction, limitation, or appointment, gift, or devise then upon further trust of the same freehold hereditaments and premises for my own heir-at-law absolutely."

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(1) Law Rep. 5 Eq. 383.

The testatrix died in December, 1838. Her sister *Mary* died in 1864, leaving two children surviving her, one of whom died in 1871; the other, *Hannah Tatley*, lived till 1889, when she died, leaving a will, made in 1885, by which she appointed this property to a trustee in trust for her children. The testatrix's sister *Eliza* had died childless in 1873.

The persons on whom the legal estate vested in the trustees of the will of *Hannah Hargreaves* had devolved took out an originating summons to have it decided whether the trust limitations, to take effect after the deaths of the testatrix's sisters *Mary* and *Eliza* and all their children, were valid, and who in the events which had happened was entitled to the property. The Defendants were the trustee under the will of *Hannah Tatley* and the person who claimed under the heir-at-law of the testatrix.

The summons was adjourned to be heard in Court before Mr. Justice *Kay*, and came on before his Lordship on the 5th of December, 1889.

Ryland, for the Plaintiffs, stated the case.

KAY, J., objected that this was a summons to determine the rights of a person claiming adversely to the will.

Ryland:—This is a question arising under the will as to whether a gift contained in the will is or is not valid.

[KAY, J.:—The heir-at-law comes and says, "This is my estate." You plead the will; that is an equitable ejectment.]

The limitations are equitable, and the trustees ask for the decision of the Court as to the effect of them.

[KAY, J.:—Trustees have no right to ask on an originating summons for the decision of a question raised by an outside claimant.]

Upjohn, for the person claiming under the heir-at-law:—

The parties are *sui juris*, and are willing to submit to the jurisdiction of the Court. The question arises in the execution of the trusts of the will, and that is sufficient to give the Court jurisdiction: *In re Davies* (1). Order LV., rule 3, seems clearly to include a case such as the present, in which the heir-at-law is a *cestui que trust* claiming under the will. *In re Bridge* (2) is distinguishable. There the limitations were legal, and the claim was altogether an outside claim.

Frederic Thompson, for the trustee under the will of *Hannah Tatley*.

KAY, J., said that unless an authority in the Court of Appeal were produced to him he should decline to hear an equitable ejectment upon an originating summons. The application, therefore, could not be entertained.

C. C. M. D.

(1) 38 Ch. D. 210.

(2) 56 L. J. (Ch.) 779.

The Plaintiffs appealed from this decision. The appeal was heard on the 29th of January, 1890.

Ryland, for the Plaintiffs:—

The question of jurisdiction turns on Order LV., rule 3. The principle of that rule is stated in *In re Davies* (1); approved by the Court of Appeal in *In re Royle* (2). Everything which could be decided in a suit to administer the estate may be decided on originating summons. There was, therefore, clear jurisdiction to determine the questions here raised, and as we have come here we should be willing for this Court to determine them.

Upjohn, for the person claiming under the heir-at-law:—

The objection was not taken by me, but by Mr. Justice *Kay*, and I submit that the Court had jurisdiction. The property being very small, I should be glad for the case to be disposed of here without incurring further expense.

F. Thompson, for the appointee, concurred in this. The case then proceeded on the merits.

F. Thompson, for the appointee:—

The power of appointment being general, an appointment under it does not, for the purposes of perpetuity, relate back to the instrument creating it: *Sugden* on Powers (3).

[COTTON, L.J.:—The difficulty you have to face is whether the power is not void for remoteness as being given to a person who may not be ascertainable within a life in being and twenty-one years.]

As regards that I rely on *Avern* v. *Lloyd* (4), where the bequest was in substance the same as here, the general power to appoint in this case being equivalent to the absolute interest in that.

[COTTON, L.J.:—Has that case ever been followed?]

I am not aware that it has. In *London and South Western Railway Company* v. *Gomm* (5) several cases of a similar description on which I might otherwise have relied were disapproved of. A question was asked in *In re Harvey* (1) as to *Avern* v. *Lloyd* (2), along with other cases, but it is submitted that it was satisfactorily answered by the counsel in that case.

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(1) 38 Ch. D. 210.
(2) 43 Ch. D. 18.
(3) 8th Ed. p. 394.
(4) Law Rep. 5 Eq. 383.
(5) 20 Ch. D. 562.

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Upjohn, for the representative of the heir-at-law, was not called upon.

COTTON, L.J.:—

This is a case where trustees of a will in whom the legal estate in fee is vested, and who are in possession of the property, come asking to have a decision, to whom, according to the true construction of the will, they ought to hand over the property. It would be construing Order LV., rule 3, too narrowly if we were to say that they cannot raise this question by originating summons. The question to whom the beneficial interest in the property now belongs turns upon the point whether the power of appointment given by the will of the testatrix is void for remoteness. The limitation to the sisters for life and to their children for their lives are perfectly good, but in my opinion the power to appoint is void for remoteness. This power is given to the last survivor of the sisters and their children. The children might not all be in being at the death of the testatrix; the power, therefore, is not given to a person who must necessarily be ascertained within the period allowed by the rule against perpetuities. On the death of the last surviving child the equitable estate devolved on the heir-at-law of the testatrix, not under the trusts declared by her will, but as on a partial intestacy occasioned by the failure of the ulterior trust.

I must say a few words as to *Avern* v. *Lloyd*, which is very like the present case. The Vice-Chancellor there says that as there may be a limitation of valid life estates to the unborn children, why may there not be this ultimate limitation after their determination? No doubt there may, if it is limited to a person who is necessarily ascertainable within the prescribed period. It is very true that after the decease of the tenants for life the children could have disposed of their interests, vested

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(1) 39 Ch. D. 289, 297.

(2) Law Rep. 5 Eq. 383.

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and contingent, so that (apart from the question of the validity of the limitations) the estate might have been disposed of as soon as the tenants for life were dead, and it may be contended that as the alienation of the estate is not prevented the case is not within the rule as to remoteness. But that is not the true way of looking at it. An executory limitation to take effect on the happening of an event which may not take place within a life in being and twenty-one years, is not made valid by the fact that the person in whose favour it is made can release it.

LINDLEY, L.J.:—

I am of the same opinion. Mr. Justice *Kay* could not have decided the question of jurisdiction as he did if there had not been some misapprehension as to the nature of the case. A trustee has got the estate in his hands, and asks the Court to tell him what he is to do with it. There may be complicated cases where a judge may say: "I cannot safely decide such a question as this in a summary way; you must proceed by action," but there is clear jurisdiction to decide such a question on summons.

As to the merits, the person who is to exercise this power is not necessarily ascertainable within the period allowed by the rule against perpetuities, and the power therefore is void. If *Avern* v. *Lloyd* (1) had been followed in other cases there would have been a difficulty, but that case has not been followed, and I do not think that it was rightly decided.

LOPES, L.J.:—

I also am of opinion that this case comes within the words and the spirit of Order LV., rule 3, and that Mr. Justice *Kay* had jurisdiction to decide the question on originating summons. As regards the construction of the will, I am also of opinion that the ulterior limitations are void because the person to exercise the power would not necessarily be ascertained within a life in being and twenty-one years.

Solicitors: *Woodcock, Ryland, & Parker; Wynne, Holme, & Wynne.*

H. C. J.

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(1) Law Rep. 5 Eq. 383.

In re WEST RIDING OF YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY.

CHITTY, J.
1890
Jan. 16, 17, 22, 23.

Building Society—Winding-up—Advanced and Investing Members—Liability for Losses—Contribution inter se—Redemption of Mortgages—Effect of Rules—Special Contract—Apportionment by Directors.

The rules of a building society provided (1) that advanced members could redeem their securities on payment of the amount fixed by the tables of the society, together with the full amount which should then be due "for subscriptions, fines, and other payments"; (2) that surplus profits "after providing for all liabilities" should be appropriated equitably and equally between the investing and borrowing members, and (3) that "in the event of the directors determining," at a special meeting to be held every three years, that there was "a deficiency of income by which the society might be prevented from meeting its anticipated expenditure and liabilities" the amount of such deficiency should be "apportioned by the directors" between the investing and borrowing members.

The society, which was registered under 6 & 7 Will. 4, c. 32, got into difficulties, and was being wound up by the Court. There was no outside creditors, but the assets were insufficient to pay investing members the full value of their shares.

On application by the liquidator to place advanced members on the list of contributories, no apportionment of losses having been made by the directors:—

Held, that the "liabilities" to be provided for under rule 2 included sums payable to investing members; that "income" in rule 3 was not used in contradistinction to capital, but meant what was coming in from all sources, and that "liabilities" in the same rule also included sums payable to investing members; that under these rules advanced members were liable to contribute to any losses together with the investing members, and that any member seeking to redeem could only do so upon paying what might be due from him in respect of this liability. The fact that the directors had not "determined" and "apportioned" the loss, made no difference now that the society was being wound up by the Court.

Rules similar to rule 3, constitute a special contract between the members, under which advanced members are liable to contribute rateably with investing members, both towards paying outside creditors and also in sharing the other losses incurred by the society, which, but for such contract, would according to *Tosh* v. *North British Building Society* (1), fall on investing members alone.

ADJOURNED SUMMONS.

These were two applications in the winding-up of the above named society raising the question of the liability of advanced or borrowing members to be settled on the list of contributories, and the terms on which they might redeem their mortgages to the society.

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(1) 11 App. Cas. 489.

The society was established in 1849 under the provisions of 6 & 7 Will. 4, c. 32, and had never been incorporated under the *Building Societies Act*, 1874.

The objects of the society were the usual ones, and its rules, which were very similar to those of other building societies, so far as material to the present question were as follows:—

"Rule II.—*Amount and Value of Shares.*

"1. The amount of each share shall be £120.

"2. The value of the share of each member at the first weekly subscription meeting after he shall have joined the society shall be £60, and the value of the same share at any subsequent period shall be estimated according to the tables of this society.

"Rule XVIII.—*Security for Money advanced.*

"1. Whenever the value of a share or shares shall be advanced to any member out of the funds of the society pursuant to these rules, the property shall be secured to the society by way of mortgage, until the amount of such share or shares shall be repaid to the society, with all fines and other payments in respect thereof, and every such mortgage deed shall be made in such form and contain all such covenants, clauses, and provisions, including a power of sale, as are usually inserted in deeds of the like nature.

"Rule XXIII.—*Power to Redeem.*

"1. If any member who shall have executed a mortgage to the society shall be desirous of paying off or redeeming the same, it shall be lawful for him so to do, by paying to the manager the amount determined at that date or period of his membership by the tables of this society, together with the full amount which shall then be due from him to the society for subscriptions, fines and other payments.

"Rule XXXIX.—*Surplus Profits.*

"1. That the present and future surplus arising from the transactions of the society, after providing for all liabilities, shall, from time to time, be appropriated equitably and equally between the investing and borrowing members by way of bonus, in proportion to the number of shares held by each member and the period subscribed for to the society.

"3. No bonus to be paid until the share be realized or withdrawn.

"Rule XL.—*Deficiency of Income.*

"1. The directors shall, every three years at least, take into consideration the general affairs and the gross receipts and expenditure of the society at special meetings of their body, to be called for that purpose by the manager, and if they shall determine at such special meeting that there is a deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and shall be paid by them severally and respectively forthwith, or by such monthly or quarterly instalments as the directors shall determine, and if the same shall not be paid accordingly, every member who makes default shall pay the same fines as for an equal amount of subscriptions or repayments in arrear as the case may be."

The proviso for redemption in the conveyance from mortgagees to the society was, upon payment to the society of "all subscriptions and moneys which by the society's rules for the time being should from time to time become payable in respect of the said shares."

The society sustained losses amounting to nearly £10,000 owing to the defalcations of its secretary and manager, and at a special meeting of the directors in November, 1887, when a balance-sheet shewing the amount of the society's losses was laid before the meeting, it was resolved to wind-up the society. In December, 1887, a compulsory order to wind-up the society was made and an official liquidator appointed.

The present summonses were taken out in the liquidation and were adjourned into Court as test cases and were argued on the assumption, which it was stated would probably turn out to

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be well founded, that the claims of all outside creditors and depositors could be satisfied in full out of the assets, but that there would not then remain enough to pay the investing members the full amount or value of these shares standing to their credit in the books of the society. Under these circumstances, the main question argued was whether the advanced or borrowing members were liable to contribute to the loss which would otherwise fall on the investing members alone.

Both summonses were opened and came on together.

Romer, Q.C., and *W. Baker*, for the Official Liquidator:—

We admit on the authority of *Brownlie* v. *Russell* (1) and *Tosh* v. *North British Building Society* (2) that the advanced or borrowing members are not, in the absence of special contract, bound to contribute, but we say rules 39 and 40 constitute such a contract. Your Lordship has already decided this point under an almost precisely similar rule in the *Albion Mutual Permanent Benefit Building Society* (3). "Income," in rule 40, is not contrasted with capital,

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(1) 8 App. Cas. 235.

(2) 11 App. Cas. 489.

(3) Chitty J., July 27, 1888.

In re ALBION MUTUAL PERMANENT BENEFIT BUILDING SOCIETY.

THIS was a summons by the liquidator in the winding-up of the above-named society, asking for the direction of the Court as to the terms on which he might be at liberty to allow advanced members who had executed mortgages to the society to redeem. The society was established under the provisions of 6 & 7 Will. 4, c. 32. It had gone into liquidation, and there were considerable sums owing to depositors and outside creditors. One question raised by this application was whether the advanced members were entitled to redeem except upon paying their share of the loss sustained by the society.

The material portion of rule 27, on which these questions were raised, was as follows:—

"Rule 27.—*Profit and Loss.*

"At the end of the first seven years, and of every succeeding seven years, an account of the assets and liabilities of the society shall be prepared showing the gross receipts, expenditure, liabilities, and surplus profits. Out of the surplus profits the one-fourth part shall be laid aside as a permanent guarantee fund, and the sum of £1 5*s*. per cent. of the total amount of the unredeemed principal shall be carried forward to meet any future losses, the residue of such surplus profits shall be appropriated by the directors at a special meeting amongst the other members by way of bonus, in equitable proportions according to number of shares, length of time, and value; and the amount of bonus to which any member may be entitled shall be passed to the credit of his account, and paid to him on withdrawal or realization of his shares, provided he has been in the society three years. If the accounts it is used in its wide sense of all that comes in; the deficiency of income has to be provided for by all members, and the whole of

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shew a deficiency of income by which the society would be prevented from meeting its liabilities and expenditure, then in the event of the contingent fund being insufficient to meet it, the amount of such deficiency shall be equitably apportioned by the directors amongst the members, and be paid by such monthly instalments as the directors shall determine. Any member having made the full payment or repayment on his shares shall remain in the society until he has made all such additional payments or repayments as the directors have allotted him; and if he has mortgaged any property to the society for an advance on his shares, such property shall not be returned or redeemable until all such additional charges shall have been paid, unless the directors shall otherwise determine."

The first account had been taken in accordance with this rule up to the end of February, 1880, and this shewed a profit; but the second septennial account, due February, 1887, had not been taken when the winding-up order was made.

Romer, Q.C., and *Eve*, for the liquidator.

Byrne, Q.C., and *Swinfen Eady*, for the advanced members.

CHITTY, J.:—

What I am called upon to decide is the terms upon which an advanced member is entitled to redeem his mortgage. The only question is one of construction of the rules, and particularly of rule 27. [His Lordship then stated rule 27, and continued:—] The rule provides in express terms that in the event of a deficiency the directors are to apportion the loss; the directors are bound to make the apportionment, but no member can escape from his liability to pay his proportion because the directors have neglected their duty. The case, to my mind, is similar to that of a contract to pay for fixtures at a fair price to be ascertained in a particular manner, and for some reason or other the particular mode of ascertaining what is to be paid cannot be carried out; still the contract is not put an end to—the main purport being that the price shall be a fair one. So, too, if there be a trust fund to be distributed among A., B. and C. in such manner as the trustees shall in their discretion determine, and the trustees make no distribution, A., B. and C. do not necessarily lose their rights in that fund, but the Court will give effect to the trust and make its own equitable distribution. So it appears to me I ought to decide this case upon a similar principle. The directors have now ceased to be in a position to exercise their duties, but nevertheless this deficiency is to be apportioned among the members. "Members" here does not mean any part or section of the members, but applies generally to the advanced and the unadvanced members. Then the rule provides for members remaining in the society until "all additional payments or repayments allotted to them" have been made; that is, that until this is done the member who has been advanced, and who has made all his other repayments, is still not to escape from his membership. It has been argued that the words are "as the directors have allotted him," and consequently that a member can escape immediately the loss ought not to fall on the investing members alone, but should be apportioned in the terms of this rule equally between the investing and borrowing members. Rule 40 constitutes an express contract between the two classes of members. Advanced members therefore should be settled on the list of contributories. It follows from this, too, that advanced members can only redeem upon paying their share of the loss: this is a "payment incurred in respect of their share" under rule 18. The fact that the directors have not made any apportionment, and have not determined that there is a deficiency of income, makes no difference, according to the decision in the *Albion Mutual Permanent Benefit Building Society* (1).

Byrne, Q.C., *Wurtzburg*, and *T. B. Napier*, for an advanced or borrowing member, and a member seeking to redeem :—

Rules 39 and 40 constitute no contract between the two classes of members to contribute to losses *inter se*; it is not a question here of paying outside creditors, it is simply a question of con-

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after the septennial account has shewn a loss on the fund, if he gives notice before the directors have proceeded to what is the more or less mechanical operation of distributing the deficiency among the members. In my opinion the rule must be construed as if the directors had made their apportionment among the members immediately upon the happening of the event; and, therefore, I have no difficulty in construing the words "as the directors have allotted him." Directly it is ascertained that there is a deficiency in the fund, then the member becomes liable to pay his just proportion of it. Then the rule goes on: "And if he has mortgaged any property to the society for an advance on his shares, such property shall not be returned or redeemable until all such additional charges shall have been paid." It is clear that this proportion which falls upon an advanced member must be paid before he redeems. I stopped intentionally at the word "paid." The rest of the clause runs on: "unless the directors shall otherwise determine." The directors cannot otherwise determine, and they ought not, if they could, in such a case as this, as the society is being wound up. The event of the directors otherwise determining is an event which cannot happen. The words have no practical bearing on the question which I have to decide. The result is that the deficiency must be equitably apportioned, and the proportion of the deficiency falling to each individual member who seeks to redeem must be paid by him before he is allowed to redeem. That is the only point which I have to decide.

Solicitors: *Bolton, Robbins, Busk & Co.*, for *Strickland & Roberts, Bristol*; *Minshalls, Parry-Jones, & Woosnam.*

W. C. D.

(1) *Ante*, p. 410, n.

tribution between the two classes of members. "Income," in rule 40, is used in its usual sense, and it is only to a "deficiency of income," when determined by the directors, that we are bound to contribute. In the *Albion Mutual Permanent Benefit Building Society* (1) there were outside creditors, here there are none. This rule only refers to the ordinary administration of the society's affairs, and is not applicable to the present state of affairs now that there is a winding-up. Mr. Justice *Stirling* had a very similar case before him in the *Bristol Mutual and Permanent Building Society* (2), where he decided that a rule similar to rule 40 did not impose upon members an obligation to contribute to the debts of the society on a winding-up, but applied only to the members while the society was a going concern, and he had the judgment in the *Albion Case* submitted to him. Besides the directors are the only persons to determine whether there is an anticipated deficiency of income, and they have not done so, consequently there is no liability. Advanced members are in reality mortgagors not members, and cannot be called upon to make good losses occasioned by fraud of mortgagees' secretary: *In re Doncaster Permanent Building Society* (3). There is no liability upon us to make any such payments to equalise the value of the shares: *In re Doncaster Permanent Building Society* (4). Advanced members, therefore, ought to be allowed to redeem upon payment of all instalments, fines, and subscriptions, as if society were a going concern.

Romer, in reply:—

The winding-up makes no difference in the construction of rule 40, that point was decided in express terms in the *Albion Mutual Permanent Benefit Building Society*. "Other payments," in rules 18 and 23, will include the liability to contribute with the investing members to the losses that have occurred.

Chitty, J. (after stating the facts and the questions submitted for his decision, and that it was clear that advanced members were not liable to contribute in the absence of special contract, and having referred to the objects and material rules of the society, continued) :—

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(1) *Ante*, p. 410, n.

(2) Stirling, J., Nov. 9, 1889. Not reported.

(3) Law Rep. 3 Eq. 158.

(4) Ibid. 4 Eq. 579.

Now it is clear under the 39th rule that when there is a profit, the proportion of profit is credited to the investing member, and it is also credited to the advanced member. The effect of crediting it to the investing member is that, supposing there are no subsequent losses, with which I will deal presently, he will in a shorter period of time, or by payment of less money with his own hand, have made up the amount of his share, and so the advanced member, who is paying his subscriptions in reference to his mortgage deed, is from time to time being relieved by the credit which is being given to his account, *pro tanto*, of the payments or repayments that he has to make.

Under this 39th rule no bonus, or share of profits, can be paid until the share is realized or withdrawn. "Realization" is not an improper term. It means when the investing member's share has been fully paid up; and "withdrawn" applies to the usual case, which is provided for by these rules, of members being permitted, on certain terms, to withdraw.

Now I will read the earlier parts of the 39th rule with a view to ascertaining its meaning. [His Lordship then read the rule and continued :—] The surplus is the surplus "arising from the transactions of the society," that is, all the transactions, "after providing for all the liabilities." The "liabilities" clearly include the liability to the investing members. The balance-sheets, of which there are many specimens in the book which has been handed up to me, appear to me to state the account of liabilities and assets correctly and in accordance with the rule. The first liability that I always find entered is, "Value of shares not advanced upon," and that is right, and that is, as I think, in accordance with this 39th rule. It is a liability that has to be met. Then, of course, in the statement of liabilities, nothing is put down in respect of advanced members. Why? Because the advanced members have had their share, and all they are doing is to make good the amounts which, according to the rules of the society, they have to pay. And in the balance-sheets running down to 1886, I find placed on the side of liabilities "Profits due to members." That, of course, is not attributing the profits rateably among the particular members entitled, but it is taking the gross sum, which is treated as a liability, and a liability to the members entitled thereto. I have no hesitation in saying that under this 39th rule, in estimating profits, the sums payable to investing members must be treated as liabilities. If the 39th rule stood alone, it is plain that the advanced members would not be liable, because, in such a society as this, clauses for division of profit are not sufficient to establish the liability of advanced members.

The 40th rule is an important one. It must be read in connection with the 39th for the proper understanding of its terms, which are not expressed with the care and exactness that could be desired. [His Lordship then read rule 40, and continued:—] I have heard an argument criticising the language of that rule, as to what is meant by the "deficiency of income" by which the society may be prevented from meeting its "anticipated expenditure and liabilities." Some part of the argument I had a difficulty in following on the term "income." It seemed at one time that counsel was trying to advance the proposition that "income" here meant some thing which was distinguished from "capital." There is no contrast in this clause between "income" and "capital." "Income" here means all that comes in. And that is so from the very nature of these societies. What is coming in from time to time are the subscriptions. The subscriptions, if an actuary were to analyse them, would be found to consist of principal and interest, but that is only in the calculation, and the interest does not appear. There is no distinction here to be found as between capital and income, which of course does exist in companies, under the Limited Liability Acts, where there is a fixed capital. I therefore hold that "income" includes, for instance, repayments by advanced members, monies borrowed from outsiders, who are commonly called in these societies, depositors, and in fact everything that comes in. Then, acknowledging, as I do, that there is some defect in the expression, I think it would also include any money that they may have in hand. That is to say, the rule runs thus, that the directors are to say that there is a deficiency of income, but that is not

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intended, because it immediately afterwards says, "a deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities;" that is to say, the liabilities that may be running off for the next three years or so, because the meetings must be held at least once within the period of three years. They are to find out in fact whether there is a loss. The "liabilities" in this clause means the same as "liabilities" in the 39th, and includes the liability to the investing members. I am not bound to put an exact meaning on every word, but I take it "anticipated" means anticipated within the triennial period, or the shorter period as the case may be; and assuming that "anticipated" is the adjective that applies to "liabilities," and that "liabilities" does not stand alone, still there would be the same result. The directors would say that according to the course of events within the period that has to run before the next taking of a similar account, they can anticipate that such and such liabilities, among others the liabilities of making repayments to the investing members, will arise, and it is for these anticipated repayments, amongst other things, that they have to take this account, and that they have to balance the income, in the large sense in which it is here used, as against the probable liabilities or payments that they have to make. This loss, which it appears to me, does include any loss which arises whereby the assets will be insufficient for the payment of the investing members is, upon the plain terms of the rule, to be borne, not by the investing members alone, but by the borrowing members also, and it is to be "equitably and equally" apportioned between these two sets of members. The language I think is quite plain, and the rule goes on to say that this liability as against the borrowing members, as well as the investing members, is enforceable in the same way as ordinary subscriptions are, with a fine for default.

Therefore I come to the conclusion, subject to the further argument which I have to deal with, that the liquidator is right in his contention, and that the borrowing members are liable to contribute in favour of the investing members to the loss, which otherwise would fall solely on the investing members.

But there is the further point, which is this. It is said that the clause has no operation under a winding-up; that it is the directors, and the directors only, that can ascertain this loss, and that unless they do so there is no liability. I have had to deal with a somewhat similar case in the *Albion Mutual Permanent Benefit Building Society* (1). The point really is, whether the substance of the clause is not to impose the liability, and whether the bringing in of the directors is not mere machinery to ascertain the amount of the loss, and to distribute it proportionately and rateably among the persons liable to contribute. I have put illustrations which I have used before: If there is a trust fund which is to be divided between *A.*, *B.*, and *C.*, in such shares as a third person shall determine, and the third person dies, or will not determine, *A.*, *B.*, and *C.* do not lose their rights. It is not said that they are to take in equal shares, but it has been decided over and over again, that the Court will divide, and divide it, of course, equally between the three. So in cases of contract, to take a common case, if there is a stipulation that fixtures shall be taken at their fair value, and the contract goes on to provide that some auctioneer named shall ascertain the value, if the auctioneer named refuses to act, still the purchaser has to pay for the fixtures according to their fair value, which must be ascertained by the Court in the best manner that it can. There are other cases of contract where everything is left to the discretion of the person who has to decide, for instance, "such sum, if any, as Mr. *A.* shall determine;" if Mr. *A.* will not undertake it, and there is no other clause, there is no liability. On the principles on which the cases, which I have given by way of illustration, have been determined, it appears that there is a substantive agreement under this rule between the members in this case for contribution.

I will deal very shortly with the language of rule 40 upon this point. The clause opens with: "The directors shall." It is obligatory upon them. They must do it. It is not a mere power, and they, being the officers of the society, unquestionably would be thought to be the proper persons to determine, and therefore as the directors were bound to do it, every one of those interested in the question would be in a position to require the directors to perform this duty. It is a duty which must be done. Then the clause does not leave it to their individual discretion, but it lays down in clear terms what is to be done, viz., that by comparing certain things the loss is to be ascertained, and that loss, when ascertained, as a mere matter of computation, is to be apportioned fairly among the persons liable to contribute. I think, therefore, that the Court can, now that there is a winding-up, apportion the liability. The directors are *functi officio,* and if they were asked would not desire to act in this case. There was no triennial meeting called for more than three years before the winding-up, subject to this observation, that on the 21st of November, 1887, which was just before the winding-up, a special meeting was called, and, as I read the minutes, it was a special meeting under the first part of the rule, to take into consideration the general affairs and the gross receipts and expenditure of the society. I have not—because it is not in evidence—the notice calling the meeting, but I have the minutes of the meeting, which was a special meeting, as is shewn in the minute-book, and the minutes disclose what took place. [His Lordship stated the facts as to this meeting from the minute-book, and continued:—] So that if there be anything in this point with regard to the directors, as a matter of fact, there is, at any rate this—the directors were shewn a balance-sheet, which I cannot say they approved, but which did shew a deficiency which is somewhere about the deficiency which has really occurred. At any rate there is this result: that the directors did not perform this duty which is imposed upon them of holding a meeting at least once in three years. It looks as if they held a meeting on this occasion for the very purpose of finding out whether there was a deficiency, and then said, instead of determining it, we will leave this question to be settled by the Court. But the point of the observation is that the full three years, the utmost time allowed, had elapsed, and the directors had not ascertained the deficiency of income. It appears to me that it is not like the case, which may be distinguishable, where the period had not elapsed, and there was something to be done in future by the directors.

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(1) *Ante*, p. 410, n.

The result is, that it is plain to my mind that the liquidator is substantially right, and that there is the liability which is claimed against the advanced members.

Then another question raised before me is this. The advanced or borrowing members are prepared now to pay off everything that can be claimed under their security, subject to this, that the liquidator says that the just proportion of the loss to which the advanced or borrowing member has to contribute is also included in the security; and that, in argument, is denied on the part of the borrowing member. The 18th rule appears to me to put an end to the question, and the mortgage deed is in conformity with this rule. That throws upon the security, not only the repayment of the shares, and all fines, but other payments, as it is called, in respect thereof—"other payments incurred." The grammar is not perfect, because it is not easy to say grammatically what is a payment "incurred," but the meaning is plain. The liability to a payment is incurred. Now the liability to make this payment has accrued at the time when the borrowing member seeks to redeem, and therefore is included within the security, and consequently he cannot redeem until this payment is made. The amount of the "payment" has not yet been ascertained; but the rule "*Certum est quod certum reddi potest*" would apply, and it is a mere misfortune—a misfortune inevitably arising in such cases as these—that the amount has not been ascertained. Theoretically, it could be ascertained at this moment, but practically I am afraid that is not the case. Consequently I hold, as a matter of right, that the borrowing member, the mortgagor, cannot redeem except upon payment of this share of loss.

[As the applications were test cases the costs were subsequently allowed as costs in the winding-up.]

Solicitors: *Burn & Berridge*, agents for *J. R. Farrar, Halifax; Ford & Ford*, agents for *C. T. Rhodes, Halifax; Emmet, Son & Stubbs*, agents for *E. M. Wavell, Halifax.*

W. C. D.

NORTH, J.
1889
Dec. 17, 18, 21.

In re MANCHESTER ROYAL INFIRMARY. MANCHESTER ROYAL INFIRMARY *v.* ATTORNEY-GENERAL.

[1889 M. 3096.]

Trustee—Power of Investment—Corporation holding Funds for Charitable Purposes—Trust Investment Act, 1889 (52 & 53 *Vict. c.* 32), *ss.* 3, 5, 6, 7, 9.

A corporation incorporated by a special Act held funds for charitable purposes:—

Held, that the corporation were trustees within the meaning of the *Trust Investment Act*, 1889, and were entitled to invest any trust moneys in their hands on any of the securities mentioned or referred to in sect. 3 of that Act, unless they were expressly forbidden to do so by the instrument creating the trust.

But *held*, that if a trustee has not, under the instrument creating his trust, power to vary the investments of the trust funds, sect. 3 does not authorize him to sell existing investments for the purpose of re-investing the proceeds on securities mentioned therein.

ORIGINATING SUMMONS by the Plaintiffs, asking that it might be determined whether the Plaintiffs, or their trustees, treasurers, and managers, were entitled to invest the funds and moneys belonging to the Plaintiffs on such securities as are specified or referred to in sect. 3 of the *Trust Investment Act*, 1889, and whether that Act applied to the *Manchester Royal Infirmary* and the funds and moneys thereof.

The *Manchester Royal Infirmary* was regulated by four special Acts of Parliament. The first, 48 Geo. 3, c. 127 (Local and Personal Acts), was passed in 1808. It was entitled:

"An Act for enabling Sir *Oswald Mosley, Baronet*, to grant certain lands and hereditaments in the parish of *Manchester*, in the County Palatine of *Lancaster*, for the purposes of the *Manchester Public Infirmary, Dispensary, Lunatic Hospital and Asylum;* and for vesting the property and effects belonging to the said charity in trustees for the benefit thereof."

By sect. 1 power was given to Sir *Oswald Mosley*, his heirs and assigns, to grant certain specified lands to trustees from time to time nominated and appointed, as therein mentioned, for the purpose of accepting and taking such grants, by the major part of the benefactors and subscribers to the said charities for the time being, upon the trusts and for the purposes thereinafter mentioned, which grants were to be taken to be valid and effectual notwithstanding the Act 9 Geo. 2, c. 36, or any of the *Statutes of Mortmain*, and the trustees for the time being so to be appointed were accordingly empowered and enabled to accept and take the same grants.

By sect. 2: "The property of all and singular the money, implements, materials, furniture, goods, chattels, and effects, matters and things whatsoever, already belonging, due, or owing to the said infirmary, asylum, dispensary, and charities, or the subscribers or benefactors thereto, in respect or on account thereof, or which shall hereafter be purchased, subscribed, contributed, or provided for the purposes of the said charities, shall, from and after such nomination and appointment of trustees as aforesaid, be vested in such trustees so to be nominated and appointed as aforesaid, their executors, administrators, and assigns, upon the trusts, and for the purposes hereinafter mentioned;" and the trustees were thereby empowered to bring actions for the recovery of property belonging to the charity, and it was provided that in all such actions it should be sufficient to state generally, that the property for which the action should be brought was the property of "the trustees for the time being of the *Manchester Infirmary*," without specifying the names of the trustees.

By sect. 4: "The said trustees so to be nominated and appointed as aforesaid, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor respectively, and the assigns of such trustees, or of the survivors or survivor of them respectively, shall stand and be seised, and possessed of, and interested in the hereditaments and premises which have been so demised or granted as aforesaid, or which shall or may be granted, or otherwise conveyed or assured, by the said present Sir *Oswald Mosley*, his heirs or assigns, in pursuance of the power and authority hereinbefore contained in that behalf, and also of and in all and singular the money, securities for money, implements, materials, furniture, goods, chattels and effects, matters and things whatsoever, which may become vested in them in consequence of this Act, and every part thereof respectively, in trust for and for the benefit of the said charities and charitable purposes accordingly, and subject to the rules, orders, and regulations now made and used, or such rules, orders, and regulations as shall hereafter be made, either with respect to the said lands, buildings, hereditaments, and premises, and the said goods and chattels of the said infirmary, dispensary, lunatic hospital, and asylum, or with respect to the recommendation and admission of patients, or otherwise relating to the management, regulation, and government of the said charities, by the major part of the benefactors and subscribers to the same charities for the time being," as therein mentioned.

Sect. 8 provided that the Act should be printed by the King's printer, and that a copy thereof so printed should be admitted as evidence thereof by all judges, justices and others.

The second Act, 5 & 6 Vict. c. i., was passed in 1842.

By sect. 2: "The president, treasurers, deputy treasurers, benefactors, and subscribers for the time being of and to the *Manchester Royal Infirmary, Dispensary, and Lunatic Hospital, or Asylum*, shall be incorporated by the name of 'The President, Treasurers, Deputy Treasurers, Benefactors, and Subscribers of and to the *Manchester Royal Infirmary, Dispensary, and Lunatic Hospital, or Asylum*,' and by that name shall be a body corporate, with perpetual succession, and a common seal, and with power to hold and retain, for the purposes of this Act, the lands comprised in the several hereinbefore-mentioned indentures, and all buildings now erected or to be hereafter erected upon the said lands, with the appurtenances: Provided always, that if any member of the said corporation shall be guilty of a breach of trust or any misfeasance in respect of any property or lands belonging to the *Manchester Infirmary, Dispensary, and Lunatic Hospital, or Asylum*, or either of them, whether under the sanction of the corporate seal or not, he shall be subject to the same liabilities as if this Act had not been passed."

By sect. 3 it was provided that, immediately after the passing of the Act, and by virtue of the same, the land and buildings of the charity should vest in the corporation, according to the true intent and purport of the conveyances executed of the same to the trustees of the charities, and that in like manner all the moneys, stocks, funds, and securities for money, goods, chattels, rights, credits, and effects, belonging, due, and owing to the charities, should be vested in the corporation, and for that purpose the persons in whose names any sums of money, stocks, funds, mortgages, securities for money, or other effects, should at the time of the passing of the Act stand or be secured, the beneficial interest wherein should belong to the charities thereby incorporated, should forthwith transfer or assign the same respectively, so and in such manner as that the same should be vested in the corporation.

By sect. 4: "As well the moneys arising from the sale or transfer of any of the public or Government funds, stocks, and securities, or any other securities, as also any other moneys for the time being belonging to the said charities, may from time to time be invested either in the name of the said corporation hereby created, or in the names of any other persons on behalf of and to be named and appointed by the said corporation, upon trust for the said charities, on mortgage of any hereditaments of a clear and indefeasible estate of inheritance in fee simple, to be situate in *England* or *Wales*, free from incumbrances, except quit rents or other annual small payments, and leases at rack rent to tenants or occupiers; . . . . or the same moneys, stocks, funds, and securities may in like manner be invested in any of the public or Government stocks, funds, or securities; and all such mortgages, stocks, funds, and securities may be from time to time called in, and the money arising therefrom be again invested in manner aforesaid, so often as may be deemed expedient."

By sect. 11: "This Act shall be a public Act, and shall be judicially taken notice of as such."

The third Act (7 & 8 Vict. c. xliii.) was passed in 1844, to enable the corporation to enlarge the infirmary, and to purchase and hold land for the erection of a new lunatic hospital or asylum. Sect. 12 provided that "this Act shall be a public Act, and shall be judicially taken notice of as such."

The fourth Act (15 Vict. c. 3) (Private Acts) was passed in 1852, for the purpose of uniting a charity, called the *Manchester*

House of Recovery, with the *Manchester Royal Infirmary*. Sect. 12 provided that the Act should not be a public Act, but should be printed by the Queen's printers, and a copy thereof so printed should be admitted as evidence thereof by all judges, justices, and others.

The other provisions of the last two Acts are immaterial for the purpose of the present report.

Nearly the whole of the funds belonging to the corporation was invested in Government securities in the name of the corporation, but there were some small sums invested in the name of the official trustee of charities.

Cozens-Hardy, Q.C., and *Farwell*, for the Plaintiffs:—

The question is, whether sect. 3 (1) of the *Trust Investment*

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(1) Sect. 3: "It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following, that is to say"—in various specified securities, and—

"(*o.*) In any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the Court;

and also from time to time to vary any such investment."

Sect. 5: "Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds."

Sect. 6: "This Act shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers hereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust."

Sect. 7: "Where the council of any county or borough or any urban or rural sanitary authority are authorized or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares, or securities in which trustees are authorized by this Act to invest, except that such council or authority shall not by virtue of this section invest in any stocks, funds, shares, or securities issued or created by themselves, nor in real or heritable securities."

Sect. 9: "For the purposes of this Act the following terms have the meaning hereinafter respectively assigned to them, that is to say (*inter alia*):—

"The expression 'trustee' shall include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee."

"The expression 'instrument' shall include a private Act of Parliament."

Act, 1889, applies to the Plaintiffs—whether the Plaintiffs are "trustees" within the meaning of the Act, and whether, having regard to the constitution of the charity, they are such trustees as can act upon the power of investment conferred by sect. 3.

There is nothing in the special Acts which forbids the investment of the funds of the charity on the securities mentioned in sect. 3 of the Act of 1889. The provision of sect. 11 of the Act of 1842, and the similar provision contained in sect. 12 of the Act of 1844 does not make them really public Acts; the object was only that they should be judicially taken notice of. They were introduced as private bills, and they are not printed with the public Acts. "The question whether an Act is public or private does not depend upon any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act), but upon the nature and substance of the case:" *Dawson* v. *Paver* (1). The funds of the charity were originally vested in trustees, and when the corporation was created by the Act of 1842 the trusts were in no way altered, but the corporation was substituted for the individual trustees as trustee for the charity.

Sir *R. E. Webster*, A.G., and *Ingle Joyce*, for the Attorney-General:—

The Act of 1889 was not intended to apply to funds held by a corporation. The officers of a corporation might be liable criminally for misapplication of its funds, and yet they would not be "trustees" of the funds in the ordinary sense of the word. In the case of a municipal corporation, for instance, there are no specific trusts affecting its funds, and yet any officer of the corporation would be liable criminally if he misapplied its funds. In the same way, the funds of an incorporated joint stock company are under the control of its directors, but they are not "trustees" of the funds. The Act of 1889, as its title shews, relates to "trust funds;" this is hardly applicable to the property of a corporation. Nor would it be correct to say that, when a fund belongs to a corporation because it is a corporation, there is any "instrument" creating a trust.

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(1) 5 Hare, 415, 434.

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[NORTH, J.:—The use of that expression "instrument (if any) creating the trust" rather seems to indicate that there may be trusts without an instrument creating them; if so, what can be meant but trusts reposed in bodies such as this corporation, or trusts created by parol?]

The provision of sect. 5, that every power conferred by the Act shall be exercised "subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds," points to the consent of some individual. Sect. 7 shews that, without its special provisions, the local authorities there referred to would not have been within the Act. The effect of the special Act of 1842 is to constitute the Plaintiffs a public body holding funds for public purposes. They are enabled to hold land themselves. They are not "trustees."

Cozens-Hardy, in reply:—

Corporations can be trustees for charitable purposes in respect of property vested in them: *In re Norwich Town Close Estate Charity* (1). There is no reason why a corporation should not hold property on trust, and, if so, why should not the Act of 1889 apply? In *In re Clergy Orphan Corporation* (2), it was held that a corporation for charitable purposes, which had moneys invested in the public funds, could, under sect. 11 of the Act 23 & 24 Vict. c. 38, sell those funds for the purpose of re-investing the proceeds on any of the securities on which cash under the control of the Court might be invested.

[NORTH, J.:—I feel some difficulty as to what is the "instrument creating the trust" in the present case. I think the special Acts relating to the charity are private Acts, but still I doubt whether they are an "instrument" such as was intended by sect. 3.]

The Plaintiffs only ask for a declaration that they are trustees within the meaning of the Act of 1889, but then they will not be able to exercise the powers of investment thereby conferred, if they are expressly forbidden to do so by the instrument creating the trust. For instance, a legacy of £10,000 might be given by will to the charity, and the will might contain a prohibition of any investment but Consols. In such a case, the will would be the instrument creating the trust, or, possibly, the will and the special Acts together.

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(1) 40 Ch. D. 298.

(2) Law Rep. 18 Eq. 280.

1889. Dec. 21. NORTH, J.:—

This case raises a question as to the application of the *Trust Investment Act*, 1889. [His Lordship stated the provisions of the special Acts, and continued:—]

The corporation have very considerable funds belonging to them, the bulk of which is invested in the name of the corporation, though there is a small amount standing in the name of the official trustee of charities.

The question is, upon what securities can these funds be now invested? In other words, does the Act of 1889 apply to them? The Act is entitled "an Act to amend the law relating to the investment of trust funds." It provides by sect. 3 that "it shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following." We have, first of all, to find whether a person is a "trustee" within the meaning of the Act, and, if he is a trustee, then the extended power of investment applies to "any trust funds in his hands." Then sect. 5 provides that "every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds." And by sect. 6 the Act is to apply as well to trusts created before as to trusts created after the passing of the Act, and the powers thereby conferred are to be "in addition to the powers conferred by the instrument (if any) creating the trust."

Then sect. 7 [his Lordship read it] is, I think, material in this way. First of all, it seems to me to contemplate that such bodies as the council of a county or borough, or an urban or rural sanitary authority, come within the scope of the Act; because I do not think it would be the right construction to say that this section is dealing with bodies entirely outside the Act, and giving them powers which, unless they have them as trustees, would not

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properly find a place in this Act at all, but ought to be found in an Act relating to different subjects. It shews that this section is not, as I was at first inclined to think, one which merely limits the powers of these bodies, but that they have power to make the investments which are contemplated in the Act. Then the point put, and it is one requiring serious consideration, is, whether it can be said that the property belonging to this corporation, which is their own property, is a "trust fund" in their hands as "trustees" within the meaning of the Act. I think it is. I think that the money is clearly held on trust for charitable purposes. It was in the first instance in terms vested in trustees by the Act of 1808, and when by the subsequent Act the funds were vested in the corporation, this was done for the purpose of facilitating the dealing with the funds, but I do not think it in any way prevents that from continuing to be a trust fund which, beyond all question, had been a trust fund down to that time. Moreover, it is a fund for the purposes of the infirmary, lunatic asylum, &c., referred to in the Acts. It seems to me beyond all question that the funds are held on a charitable trust, with respect to which the rights and duties of trustees belong to and are imposed on the body in whom the funds are now vested in trust, just as they would in the case of any ordinary trustee. Suppose that this corporation proposed to advance some of their money to the Corporation of *Manchester* for the improvement of their streets, or any other purpose, that would clearly be a breach of trust; on the application of the Attorney-General I should at once restrain them from committing any such breach. Supposing that an advance was actually made in the same way, but a security was taken for the money, precisely the same rules would apply; unless it turned out that the security taken was one upon which the corporation are authorized to invest their funds, in which case the advance would not be a breach of trust.

It seems to me, therefore, clear that these funds are trust funds vested in the corporation of the *Manchester Infirmary* as a "trustee" within the meaning of the Act.

Mr. *Cozens-Hardy* referred to *In re Clergy Orphan Corporation* (1), which is very like the present case, but, curiously enough, the point which I have now to decide seems there to have been withdrawn from the consideration of the judge. The headnote to the report is as follows: "Stock in the funds belonging to a charity incorporated by Act of Parliament, and having power to invest in the public funds, may, under sect. 11 of the statute 23 & 24 Vict. c. 38, be sold out for the purpose of re-investment on any of the stocks, funds, and securities on which cash under the control of the Court may be invested." Sect. 11 of that Act provided that "When any such general order as aforesaid shall have been made" (that is as to cash in the control of the Court), "it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested." But the petition presented in that case sought the advice and direction of the Court as to whether funds already invested could be sold for the purpose of re-investment, and the argument of Mr. *Cozens-Hardy* for the petitioners was this (1): "No question is asked as to the power under sect. 11 to invest in the manner desired, any funds to be hereafter acquired by the society, but the decision in *In re Warde* (2) has caused a question to be raised as to the powers of the trustees to sell out funds already invested, with a view to re-investment, where there is no express power of varying existing securities." Then Vice-Chancellor *Malins* said (3): "I consider that the intention of sect. 11 was to enlarge the powers of investment previously belonging to trustees by allowing them to invest any fund in their hands on the stocks, funds, and securities from time to time sanctioned by the Court; and my opinion is, that, the petitioners being trustees, and having funds directed by their Act of Parliament to be invested in the public funds, come within the enabling clause, and that consequently all the funds of this charity, whether invested or not, may be dealt with as cash under the control of the Court. I do not say that the decision

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(1) Law Rep. 18 Eq. 280.

(1) Law Rep. 18 Eq. 281. (2) 2 J. & H. 191.
(3) Law Rep. 18 Eq. 282.

in *In re Warde* (1) was not right, but though I do not see very clearly the grounds of that decision, it must, I think, be treated as depending upon its special circumstances. I consider, therefore, that the petitioners may sell out the existing stock with a view to re-investment; and I shall therefore answer the question in the affirmative." The point, therefore, decided there was, not whether the trustees could re-invest, but whether they could sell out existing stock for the purpose of re-investment. No doubt there is an observation made by Vice-Chancellor *Malins* which shews he thought that they were trustees within the meaning of the Act, although that was not the point to which his attention had been directed by the argument, and which was being answered by him. The further point was suggested, whether Metropolitan Consolidated Stock was within the power of investment, and that turned upon sect. 13 of the *Metropolitan Board of Works Act*, 1871. The Vice-Chancellor said (2): "That section seems wide enough to include the present charity. The petitioners will therefore be allowed to invest in that stock." That, again, was an observation upon a point not raised by the petition, and not calling for decision. Still, so far as the case goes, it shews that the Vice-Chancellor took that view, although the point had not been argued, and that is in favour of the view which I have taken of the construction of the Act of 1889.

I propose, therefore, to make a declaration that the corporation are trustees within the meaning of the *Trust Investment Act*, 1889, and are entitled to invest any trust funds in their hands in the manner thereby authorized, unless expressly forbidden by any instrument creating the trust.

I should add that I do not consider that *In re Clergy Orphan Corporation* (3) in any way interferes with the decision in *In re Warde*, and, therefore, my decision is not intended to lay down that the corporation have any power to sell existing securities for the purpose of making other investments under the power given by the Act. That depends entirely on what their powers may be independently of this Act. The Act does expressly provide by the final clause of sect. 3 that trustees who may invest

(1) 2 J. & H. 191.

(2) Law Rep. 18 Eq. 282.

(3) Law Rep. 18 Eq. 280.

as therein mentioned may "also from time to time vary such investments." Those words are necessary, for this reason. If trustees by the instrument creating their trust had a more limited power of investment, and had also power to vary investments, there might have been a question, whether the power contained in the instrument to vary the investments authorized by it could extend to investments which are authorized not by the instrument but by the Act; and it is for the purpose of preventing any question of that sort from arising that the words which I have just read are inserted in sect. 3. But the express direction that trustees are to have power to vary the investments authorized by the Act goes some way to shew that it does not touch the question whether they have power to vary securities for the purpose of making such investments as are authorized by the Act. That is the reason why I limit the declaration which I make expressly to funds in the hands of the corporation.

Solicitors for Plaintiffs: *Pritchard, Englefield, & Co.*, agents for *Earle, Sons, & Co., Manchester.*

Solicitors for Attorney-General: *Hare & Co.*

W. L. C.

In re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY.

NORTH, J.
1889
Dec. 18, 21.

Trust Investment Act, 1889 (52 & 53 *Vict. c.* 32), s. 3—*Benefit Building Society.*

Funds of a benefit building society invested in the names of trustees for the society under the direction of the board are not trust funds subject to the powers conferred by the *Trust Investment Act*, 1889.

THIS was a petition by the directors and trustees of the *National Permanent Mutual Benefit Building Society* for the purpose of being advised whether they were trustees, and whether the funds of the society under their control were trust funds in their hands within the meaning of the *Trust Investment Act*, 1889. The society was established in 1849, and registered under the Act 6 & 7 Will. 4, c. 32. In April, 1880, it was incorporated

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under the *Building Societies Act*, 1874. Rules of the society were duly certified under the former Act; they had not been altered since the incorporation of the society except as to the time of holding the annual meeting of the society. The certified rule as to investments was as follows: "Whenever the money in hand shall in the opinion of the board be sufficient for the purpose, it shall be employed in advancing the shares of those members whose subscriptions are not in arrear, and the order in which members shall become entitled to advances shall from time to time be determined by the board, and all money not so employed shall be laid out in such investments or advanced upon such legal or equitable securities as the law permits in the names of the trustees but under the direction of the board."

The 25th section of the *Building Societies Act* of 1874 enacts that "Any society under this Act may from time to time, as the rules permit, invest any portion of the funds of the society, not immediately required for its purposes, upon real or leasehold securities, or in the public funds, or in or upon any parliamentary stock or securities, or in or upon any stock or securities payment of the interest on which is guaranteed by authority of Parliament, or in the case of terminating societies, with other societies under this Act; and for the purpose of investments in the public funds or upon security of copyhold or customary estate, the society, or the board of directors or committee of management thereof, may from time to time appoint and remove trustees."

The 27th section of the Act of 1874, as amended by statute 40 & 41 Vict. c. 63, s. 3, enacts that "all rights of action and other rights, and all estates and interests in real and personal estate whatsoever, belonging to or held in trust for any society certified under the said repealed Act," (the Act of 6 & 7 Will. 4, c. 32) "shall, on the incorporation of the society under this Act, vest in the society without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of *Great Britain* and *Ireland*, and estates in copyhold or customary hereditaments, the title to which cannot be transferred without admittance."

Part of the funds of the society not in use in advancing members was invested in the name of the corporation. A portion was

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invested in the names of three trustees in Consols. The object of the petition was to determine whether the Consols might lawfully be sold out and the proceeds invested in some of the securities enumerated in sect. 3 of the *Trust Investment Act*, 1889.

Swinfen Eady, for the Petition :—

The trustees in whose names the Consols stand are within the words of the 3rd section of the *Trust Investment Act*, 1889, trustees who are not "expressly forbidden by the instrument creating the trust" to invest in the proposed securities. The benefit intended to apply to other trust investments would apply equally to the money of a building society. I submit, therefore, that the Act applies to the funds of the society so far as they are in the names of trustees. In the next place the directors of the society are themselves trustees. If it is the persons who have the control of trust funds who are trustees under the Act, having funds in their hands, the directors are such persons, and the whole of the funds of the society not employed in advancing members are subject to the *Trust Investment Act*. That directors are trustees is established by *Hardy* v. *Metropolitan Land and Finance Company* (1).

NORTH, J. (after stating the facts, continued) :—

The question now is whether the Consols belonging to this society standing in the names of these three trustees can be sold by them and laid out in other securities within the terms of the Act of 1889. In my opinion they cannot. In the first place I think that the powers of investment contained in the Act are larger powers given to trustees who have already power to invest, and merely apply to trustees who hold funds for the purpose of investment. In respect of building societies under the *Building Societies Acts* this general enactment relating to trustees which does not refer to building societies, cannot be intended to alter the powers of such societies, which are regulated by the 25th section of the *Building Societies Act*, 1874. In order to give larger powers than are contained in that section, I think there should be either an express direction or something that shews by necessary implication that there is an intention so to enlarge the powers. But I do not think that is the only answer. Even supposing the 25th section of the *Building Societies Act* would be affected by a general investment Act, does the Act of 1889 really apply to such a case? In my opinion it does not. I do not think the funds of a building society are trust funds. The property of a building society belongs to the society or its members, and its members do not hold the property on any trust. The property of such a society is quite different from that of a charitable institution. In my opinion the funds of the society are not trust funds at all in the sense used in the *Trust Investment Act.* And further, it is to be noticed that it is not the object of a building society to invest.

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(1) Law Rep. 7 Ch. 427.

Then it is suggested that the trustees in whose names the Consols stand are trustees for investment so as to bring the funds in their names under the operation of the *Trust Investment Act.* It will be recollected that the rule of the society relating to investments provided that funds should be invested in the names of trustees but only under the direction of the board of directors. That is a rule which has not been altered and is still subsisting so far as these investments are concerned. I do not think, therefore, these trustees are trustees holding funds in their hands which they can invest; or that this Act applies to trustees who do not hold funds in their hands upon trust to invest. In my opinion the Act extends the powers in respect of the kind of securities upon which trustees who already have limited power to invest may invest, but it does not give power to trustees who have no power to invest independently of the Act. It seems to me that the trustees of the society are not trustees under the Act. If there were a person absolutely entitled to a fund in the hands of a bare trustee for him; and such person did not wish to take the funds into his own hand, and did not wish to have the state of investment changed, it could not be contended that the bare trustee in that case could have power given him by this Act of varying such investment.

Then it is suggested further that the ten directors of the society are trustees having trust funds in their hands within the meaning

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of the Act. In my opinion they are not. In point of fact they have not any trust funds in their names, and are not trustees for investment, but are the agents of the society for the purpose of carrying on the business of the society. It is said they are in a fiduciary position; and no doubt if property of the society come to their hands is misappropriated they will be liable for breach of trust. But so is any other agent. It seems to me, therefore, that the directors are not trustees having trust funds in their hands to invest within the meaning of the Act.

The result is, I come to the conclusion that the Act does not apply to a building society whose funds are invested in their own name or in the name of trustees who have no power of investing. That view is confirmed by the 5th section of the *Trust Investment Act,* which provides that "Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust." From that it appears that the Act is intended to apply to trustees who have a discretion as to investment independently of the Act.

Solicitors: *Russell & Co.*

D. P.

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[1889 B. 3638.]

DAY *v.* FOSTER.

[1889 D. 719.]

Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32—*Action for Infringement.*

F. was exclusive licensee of *D.*, a patentee; he was also exclusive licensee of *B.*, a subsequent patentee. *D.* sued *F.* for a declaration that articles made under *B.'s* patent were an infringement of his, *D.'s*, patent, and for an injunction to restrain manufacture and sale under *B.'s* patent without paying royalties to *D.* and accounts of royalties for past manufacture. Previously to the issue of the writ, *D.'s* solicitor had written to *F.'s* solicitors that *B.'s* patent was within *D.'s* patent, and claims would be made in the action then intended in respect of articles made under *B.'s* patent.

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B. sued *D.* under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, for an injunction to restrain threats:—

Held, that *D.'s* action was an action for infringement within the meaning of that section, and as it had been brought with due diligence the section did not apply, and *B.'s* action was stayed.

JOSEPH MICHAEL DAY, the Plaintiff in the action of *Day* v. *Foster* and the Defendant in the action of *Barrett* v. *Day*, was the owner of a patent dated 1885 for "an improved bottle for aërated liquids."

Barrett & Elers, the Plaintiffs in the action of *Barrett* v. *Day*, were the owners of a patent taken out by *Barrett* and *Varley* in 1887 for "improvements relating to means for facilitating the opening of internally stoppered bottles for aërated and other liquids."

In August, 1886, *Day* granted to *Foster* the exclusive license for the portion of his invention that related to "trigger openers."

In November, 1888, *Barrett & Elers* gave *Foster* an exclusive license for their patent.

Towards the latter part of 1888 complaints were made on the part of *Day* to *Foster* that *Foster* had been making articles in accordance with his patent for a trigger opener without paying royalties. *Foster* asserted that he had made articles under a patent of his own, and also *Barrett* and *Varley's* patent, which he insisted were not within *Day's* patent.

On the 24th of April, 1889, the writ in *Day* v. *Foster* was issued.

On the 29th of June, 1889, the statement of claim was delivered. The statement of claim alleged that *Foster* had manufactured trigger openers only colourably differing from those made in accordance with *Day's* patent, on which he refused to pay royalties. The claim was for a declaration that the trigger openers in respect of which royalties were refused were comprised within the Plaintiff's patent, and that the Defendant ought to pay royalties; an injunction to restrain manufacture and sale without payment of royalties, and an account of royalties for the past.

On the 16th of August, 1889, the writ in *Barrett* v. *Day* was issued. The action was brought under sect. 32 of the *Patents,* *Designs, and Trade Marks Act*, 1883, for an injunction to restrain the Defendant from threatening to take legal or other proceedings against persons using, manufacturing or selling the Defendant's invention. The statement of claim in that action set out a letter from *Day's* solicitor to the solicitors who were acting for both *Foster* and *Barrett & Elers*, dated the 17th of December, 1888, to the effect that they had only just seen a copy of *Barrett* and *Varley's* specification, and that it was clearly an infringement of *Day's* patent, and that in the action then intended to be brought by *Day* against *Foster* claims will be made in respect of this patent. No threat other than the threat contained in that letter had been made by *Day*. The action of *Day* v. *Foster* had been set down for trial.

A motion was now made on the part of *Day* to stay all further proceedings in *Barrett* v. *Day* on the ground that there was no cause of action. There was also before the Court a summons by *Foster* in the action of *Day* v. *Foster* that all further proceedings in that action should be stayed till the action of *Barrett* v. *Day* was tried. Counsel at the Bar asked that the summons might be treated as an application to try the two actions together.

The facts will be found in detail in the judgment.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for *Day* :—

There is no cause of action on which to found the action of *Barrett* v. *Day*; it ought not therefore be allowed to go on so as to harass the Defendant in the first place. The only cause of action for such an action is the existence of a threat. The only threat ever made is contained in the letter of the Plaintiff's solicitor of the 17th of December, 1888. That threat was carried into execution when *Day* issued his writ and no longer existed as a threat. In the second place, sect. 32 of the *Patents Act*, under which alone is there any jurisdiction, does not apply, provided "the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." Here *Day* did bring an action for infringement with due diligence: *Challender* v. *Royle* (1); *Combined Weighing and Advertising Company* v. *Automatic Weighing Machine Company* (2). It was the

(1) 36 Ch. D. 425.

(2) 42 Ch. D. 665.

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right of *Day*, and his duty to get a stay of proceedings in the action to restrain threats; if he allowed it to go to trial he would not get his costs: *Combined Weighing and Advertising Company* v. *Automatic Weighing Machine Company* (1).

Moulton, Q.C., and *Thomas Terrell*, for *Barrett & Elers* and *Foster*:—

As regards the summons by *Foster*. He is precluded, being a licensee from *Day*, from contesting the validity of *Day's* patent, the only issue that can be raised is whether *Barrett* and *Varley's* patent comes within *Day's* patent. In the other action the issue whether *Day's* patent is valid is properly raised. It is not right that these questions should be tried separately; it is hoped to place *Day* in the dilemma that his claim is either too wide or cannot include *Barrett* and *Varley's* patent; if he can try the issue of infringement separately he will have an unfair advantage. We ask now, not that the action of *Day* v. *Foster* should be stayed till after the trial of the action, but that the summons may be amended and the two actions should be tried together.

As regards *Day's* summons. There is no ground for staying the action of *Barrett* v. *Day*. A threat had been made which gives a right of action under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883. No action for infringement has been brought so as to prevent the application of that section, *Day's* action being one in which all the issues usually raised in an infringement action cannot be raised. In the next place such action must be brought with due diligence after the action to restrain threats has commenced.

Cozens-Hardy, in reply.

1890. Feb. 4. NORTH, J.:—

Joseph Michael Day, the Defendant in the first of these actions, is the owner of letters patent, granted on the 31st of December, 1885, for "an improved bottle for aërated liquids," and on the 13th of August, 1886, he granted to the Defendant *Foster* sole and exclusive license to make and vend that portion of the invention called the trigger opener, at a royalty of 1*s.* per gross, payable quarterly. The license contained provisions that the licensee should not directly or indirectly use or exercise that part of the invention otherwise than in accordance with the license, and should not at any time dispute the validity of *Day's* patent. For some time *Foster* manufactured the articles for which that license was given, and paid *Day* the royalties in respect thereof, but in the year 1888 *Day* found that *Foster* was making trigger openers for which he was not paying royalty, of a pattern for which he had himself applied for letters patent, but which *Day* alleges are made in accordance with his patent, and are therefore subject to royalty. Thereupon some correspondence ensued between their solicitors, in the course of which (on the 24th of November, 1888), *Foster's* solicitors wrote that *Foster* would protect himself under his own patent and a patent of *Barrett* and *Varley's* which *Foster* had secured. This was the first time *Day* ever heard of *Barrett* and *Varley's* patent, which, upon investigation, turned out to be dated the 2nd of November, 1887, for "improvements relating to means for facilitating the opening of internally stoppered bottles for aërated and other liquids." It appears from the evidence that these letters patent were applied for on behalf of and at the expense of the Plaintiffs, *Barrett & Elers*, and that they early in November, 1888, granted to *Foster* an exclusive license to use and exercise that patent; although the formal assignment by the patentees to *Barrett & Elers*, and the formal license by them to *Foster*, were only executed on the 11th and 17th of January, 1889, respectively. On the 17th of December, 1888, *Day's* solicitor wrote to *Foster's* solicitor as follows:—

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(1) 42 Ch. D. 665.

"It was only Saturday last that my client was enabled to procure a copy of Messrs. *Barnett*" (meaning *Barrett*) "and *Varley's* specification. It is clearly an infringement upon his patent. I thought it right to have this matter investigated before proceeding. I have now only to notify to you that in the action against your clients claims will be made in respect of this patent. I think it is only right to inform you of this before the writ is issued."

In pursuance of an arrangement between them, *Foster's* soli-

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citors, on the 13th of February, 1889, furnished to *Day's* solicitors particulars of the sale by *Foster* on the previous day of one gross of openers made under *Barrett* and *Varley's* patent, and stated that *Foster* definitely declined to pay *Day* any royalty in respect of that sale, and intended to go on selling such openers, and not paying *Day* any royalty on them. *Day* apparently desired that the action he was about to bring against *Foster* should relate to articles sold by *Foster*, and purporting to be made under his own patent, as well as under that of *Barrett* and *Varley;* but *Foster's* solicitors refused to furnish an instance of any such sale. *Barrett & Elers* were at this time assisting *Foster* in opposing *Day*, and were employing the same solicitors for that purpose, and in letters dated the 15th and 22nd of March, 1889, respectively, those solicitors, on behalf of *Barrett & Elers*, called *Day's* attention to his threats to proceed against *Foster*, requiring him to withdraw such threats or promptly commence an action to make them good, and referring him to sect. 32 of the *Patent Acts*, 1883. *Day* did accordingly issue his writ against *Foster* on the 24th of April, 1889, and his statement of claim was delivered on the 29th of June, and after referring to *Day's* own patent and his licence to *Foster*, it alleged, "The Defendant has manufactured and sold trigger openers differing only colourably from those made in accordance with the Plaintiff's letters patent, and has refused to pay royalties thereon, alleging as his reason that the trigger openers so manufactured and sold were made according to an alleged invention comprised in certain letters patent granted to *Henry Barrett* and *John James Varley* (No. 14,941 of the year 1887), and are not within the privilege granted by the Plaintiff's letters patent or affected by the said license. The trigger openers made according to the alleged invention of the said Messrs. *Barrett* and *Varley* do not differ in any material respect from the trigger openers protected by the Plaintiff's said letters patent." The Plaintiff claimed (1), "A declaration that the said trigger openers in respect of which the Defendant refuses to pay royalties are comprised within the Plaintiff's said letters patent, and that the Defendant is liable to pay royalties in respect thereof, in accordance with the said license; (2) an injunction to restrain the Defendant, his servants, agents, and workmen from making or vending (except subject to the terms of the said license) trigger openers made in accordance with the description contained in the specification filed under the said letters patent granted to *Barrett* and *Varley*, or only colourably differing from the trigger openers manufactured in accordance with the Plaintiff's letters patent; (3) an account of the royalties due to the Plaintiff from the Defendant under the said license."

Foster's defence to that action was a very simple one; it was as follows:—"(1) The Defendant has duly accounted for and paid to the Plaintiff all royalties due under and in pursuance of the indenture of license referred to in paragraph 2 of the statement of claim, and dated the 13th of August, 1886; (2) the Defendant admits that he has manufactured openers for internally stoppered aërated water bottles made in pursuance of the specification of *Henry Barrett* and *John James Varley* (No. 14,941 of the year 1887), but he says that such openers are in no way an infringement of the Plaintiff's said patent, nor are they included within the terms of the indenture of license dated the 13th of August, 1886." That defence might have been put in very promptly, but *Foster* had his time to deliver it twice extended, and it was not, in fact, delivered until the 24th October, and the action was shortly afterwards set down for trial. In the meantime *Barrett & Elers* had, on the 16th of August, issued a writ against *Day* to obtain an injunction restraining the Defendant from, by circulars, advertisements, or otherwise, threatening to take legal or other proceedings against persons manufacturing, using, or selling an alleged invention of the Defendant—to wit, "an improved bottle for aërated liquids"—comprised in letters patent, dated the 31st of December, 1885, and numbered 16,057, and damages, and had applied on the 29th of August for an injunction in accordance therewith, but that application was refused. The affidavit of the solicitor, filed in support of that application, stated that the threats complained of were the letter of the 17th of December, 1888, which I have already read, and did not complain of or mention any other threats, and I may at once say that the suggestion in the writ to the effect that *Day* had issued any threatening advertisements or circulars was a mere fiction, and was not repeated.

On the 24th of October *Barrett & Elers* delivered their statement of claim against *Day*, in which they allege that *Day* had threatened *Foster* with legal proceedings in respect of an alleged infringement, repeating the statement that the threats were contained in the letter of the 17th of December, and that the Plaintiffs had suffered damage by reason thereof, and they claimed an injunction restraining *Day*, his solicitors, and agents, from threatening *Barrett & Elers*, or their licensees or assigns, with reference to alleged infringements of *Day's* patent, and damages and costs. Within a week after the delivery of that statement of claim—viz., on the 31st of October—*Day* took out a summons in the action of *Barrett & Elers* v. *Day*, that all proceedings therein might be stayed, and on the 2nd of November *Foster* took out a summons that all proceedings in *Day* v. *Foster* might be stayed until after the action of *Barrett & Elers* v. *Day* had been tried, and both these summonses were adjourned into Court to be heard by me together. Before dealing with those applications on their merits one additional matter must be mentioned—viz., that *Barrett & Elers* alleged in their statement of claim that *Day* refused to join them as Defendants in his action against *Foster*, or to allow *Foster* to contest the validity of *Day's* patent, and that *Foster's* manufacture was not an infringement of *Day's* legal rights, because (1) that manufacture is not an infringement of *Day's* patent, and (2) *Day's* patent is bad on the grounds of insufficiency of specification, want of novelty and utility, and *Day's* not being the first and true inventor. As regards the validity of *Day's* patent, it is now four years old, and no proceeding has been taken by *Barrett & Elers*, or by *Barrett*, *Varley*, or any one else to have it repealed or revoked, and I must, therefore, for present purposes, treat it as valid: See *Wren* v. *Weild* (1); *Halsey* v. *Brotherhood* (2). *Foster* does not set up that it is invalid; the law estops him from doing so as a licensee; and, moreover, he has contracted that he will not at any time dispute the validity of *Day's* patent, and the complaint that *Day* will not allow *Foster* to do what he has not attempted to do and has expressly contracted not to do is absurd. Then as to the question whether what

(1) Law Rep. 4 Q. B. 730.

(2) 15 Ch. D. 514; 19 Ch. D. 386.

Foster has done is or is not within *Day's* patent, that is the very thing which has to be decided, and will be decided in the action of *Day* v. *Foster*. If it is not, *Day's* action will fail. But if it is, there is no reason why it should not be decided against *Foster* alone. In fact *Day* could not join *Barrett & Elers* as Defendants in that action, for he has no cause of action against them for what *Foster* has done. The fact that *Barrett & Elers* have a patent for a thing which if made would be an infringement of *Day's* prior patent would not justify an action for infringement by *Day* against *Barrett & Elers*. See *Challender* v. *Royle* (1). It is true that *Barrett & Elers* allege for the first time in their statement of claim that they have themselves manufactured and sold articles substantially as claimed in *Barrett* and *Varley's* patent, but they give no details or admissions as to the nature of such articles, or the time or extent of the manufacture thereof, and *Foster* has, ever since November, 1888, had a license from them. However this may be, there is no possible ground upon which I can hold that *Day* is bound to combine in one action his claim against *Foster* in respect of the manufacture and sale of certain articles, and any claim he may have against *Barrett & Elers* in respect of the manufacture or sale by them of other articles, nor can I hold it unreasonable that *Day*, who has commenced and is duly prosecuting an action against *Foster* for what he alleges to be, but which *Barrett & Elers* and *Foster* all deny to be, an infringement, should wait the result of that action before commencing proceedings against other alleged infringers in respect of any similar infringements.

The sole ground of complaint, therefore (if any) which *Barrett & Elers* have against *Day* is in respect of his solicitor's letter to *Foster's* solicitor of the 17th of December, and the question is whether that letter gives *Barrett & Elers* any ground for commencing or further prosecuting their action against *Day*. It is scarcely disputed that no such action could have been brought before the passing of the *Patents Act* of 1883. The letter in question was written to *Foster's* advisers as a fair and open warning that *Day* did not accept the excuse put forward by *Foster* as a justification of what he had done, and would assert his rights

(1) 36 Ch. D. 425.

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by action, and the concluding words of the letter, "I think it only right to inform you of this before the writ is issued," are exactly what it was right *Day's* adviser should say before entering into litigation. According to the well-known case of *Wren* v. *Weild* (1) (approved in *Halsey* v. *Brotherhood* (2)), *Barrett & Elers* could only have succeeded in an action founded upon that letter if they could prove affirmatively that *Day's* claim was not a *bonâ fide* claim in support of a right which, with or without cause, he believed he had, but was a *mala fide* and malicious attempt to injure them by asserting a claim of right, against his own knowledge that it was without any foundation, and no such case is suggested by the pleadings. The *bona fides* of *Day's* action is not challenged, and no attempt was made before me to shew that the articles made by *Foster* are so entirely outside *Day's* patent that there is no reasonable and probable cause for *Day's* allegation that such articles are an infringement. But does the 32nd section of the *Patents Act*, 1883, give *Barrett & Elers* any right of action against *Day* in respect of that letter? Judges have frequently expressed strong opinions as to the propriety and fairness of warning an opponent by letter of intended proceedings against him before rushing into litigation, and in *Wren* v. *Weild* and in *Halsey* v. *Brotherhood* before the Master of the Rolls, such remarks were applied to patentees about to sue alleged infringers. But it has been held by Vice-Chancellor *Bacon* in the *Driffield and East Riding Pure Linseed Cake Company* v. *Waterloo Mills Cake and Warehousing Company* (3), and by Mr. Justice *Kekewich* in the *Combined Weighing and Advertising Company* v. *Automatic Weighing Machine Company* (4), that such a letter by a patentee's solicitor to an alleged infringer or his solicitor threatening an action for infringement does give a cause of action under this section, and I fear this will have the effect of preventing a patentee from adopting the course thus pointed out to be fair and reasonable, and that for the future the warning letter will only accompany instead of precede the writ, and will consequently be useless. But finding such decisions existing, I am bound to follow them, and therefore to hold

(1) Law Rep. 4 Q. B. 730.
(2) 15 Ch. D. 514; 19 Ch. D. 386.
(3) 31 Ch. D. 638.
(4) 42 Ch. D. 665.

that the letter of the 17th of December gives a cause of action to any "persons aggrieved thereby." That section, however, contains a proviso at the end which qualifies the whole section and is as follows:—"Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." If, therefore, *Day* has by his proceedings in *Day* v. *Foster* brought himself within that proviso, there is no ground of action against him under sect. 32. It is said that *Day's* action is not an action for infringement within the proviso. It is certainly the only action or proceeding with respect to which *Day* has used any threat, and unless it is an action for infringement I do not see how the threat to bring it gives a right of action under sect. 32, as that section only applies to cases in which a patentee of an invention has used threats with respect to an alleged manufacture, use, sale, or purchase of an invention which is proved not in fact to be an infringement. If the action is not one for infringement of a patent it is difficult to see how a threat to bring it can be a threat in respect of something done which is asserted to be an infringement of it, which, according to Lord Justice *Bowen* in *Challender* v. *Royle* (1), is requisite to make the section applicable. Again, *Foster* treats it as an action for infringement, for he sets up by way of defence that the articles he has manufactured are not an infringement, and in his affidavit he says that the sole question in *Day* v. *Foster* is whether articles manufactured under *Barrett* and *Varley's* patent are or are not within *Day's* patent. *Barrett & Elers* in their statement of claim say that the proceedings threatened were in respect of an alleged infringement, and plead, by way of reply thereto, that what *Foster* did was not, in fact, an infringement. And I have no hesitation whatever in holding that *Day's* action is an action for infringement within the section. *Day* is a patentee, whose patent is clearly valid against *Foster*, and *Day* has under it the sole right to make and vend the particular article, and he sues *Foster* for making and selling that article. That certainly looks very like an action for infringement. But it is argued that it is not such, because *Foster* has a license from *Day* to make and sell such

(1) 36 Ch. D. 441.

articles, and therefore cannot be sued for infringement. I do not see how this would prevent the action being one for infringement, though it might give *Foster*, if that were all, a good ground of defence. It is argued that *Day* does not ask for relief on the footing that *Foster* is making and selling what he has no right to make and sell, but only for payment of royalty upon the footing of the license. But it is necessary to look at the whole case. The defence that *Foster* sets up, and that *Barrett & Elers* also set up for him in their statement of claim, is not that *Foster* is protected by his license, but that the license has nothing to do with the matter, and no royalty is payable under it, because the articles are not made under the license and are not within *Day's* patent at all; and that is the question to be decided. If *Foster* fails, it will be because he has infringed *Day's* rights. He might have had a good defence if he had relied upon the license, paying the royalty. But he has refused to pay the royalty, and he cannot and does not attempt to say that, if the manufacture would have been an infringement but for that license, the license prevents its being so. The license is merely a license to make the articles paying the royalty; and when *Foster* repudiates all obligation to pay royalty, he cannot rely upon the license as a justification for the manufacture. *Foster* denies that the articles he makes are within the license, and claims to manufacture them because they are not protected by *Day's* patent. *Day* alleges that they are, and claims specifically an injunction to restrain the manufacture thereof, except subject to the terms of the license: *i.e.*, on payment of the royalty; and if that is not an action for infringement I do not know what is.

It is said further that *Day's* action is not within the proviso, even if it is an action for infringement; because what the section contemplates is an action for infringement commenced after an action for threats under sect. 32, whereas *Day's* action was commenced before it. If that were so, and *Day* desired to have the protection of that proviso, he would have had to dismiss the existing action of *Day* v. *Foster*, and, I suppose, pay the costs of it, and commence a fresh action against *Foster* on exactly the same lines, which new action doubtless would have been said not to have been commenced with due diligence after the threat. But I find nothing in the proviso warranting this contention, or pointing to the time when the action for infringement is to be brought, except that it is to be with due diligence. It must be borne in mind to what case the section is addressed—that of a patentee who causes damage by disseminating threats which he does not or will not justify by an action, who is "willing to wound, but yet afraid to strike." It is not necessary for me now to express any opinion whether the bringing of an action for infringement with due diligence after the making of a threat renders an action for threats commenced in the meantime wrong from the beginning, because not founded on any good cause of action, though I do not feel much doubt as to the meaning of the Act. But I do express a decided opinion that, if a threatened action for infringement is commenced and prosecuted with due diligence after such threat, there is no ground upon which an action under sect. 32 in respect of such threat can subsequently be commenced at all. To put it in another way, if a threat to bring an action for infringement is followed up by the *bonâ fide* commencement and prosecution with due diligence of the threatened action, there is no "person aggrieved" by the threat, and therefore no person who can bring an action under sect. 32; although I have no doubt that *Barrett & Elers* might have been "persons aggrieved" if no action for infringement had been commenced when they brought their action, or within a reasonable time afterwards. In the present case I am of opinion that the action of *Day* v. *Foster* certainly was commenced with due diligence having regard to the date of the threat, the letters of *Foster's* solicitor on the 15th and 22nd of March, and the reasonable desire of *Day* to combine all his complaints against *Foster* in one action, and especially having regard to the nature of the threat, and to the fact that no action grounded thereon had been commenced when the writ was issued in *Day* v. *Foster*.

It was also argued by the very able counsel who appeared for *Barrett & Elers*, as well as for *Foster* (who left no stone unturned on behalf of their clients), that the action of *Day* v. *Foster* is not within the proviso, because it is not one in which the validity of the patent is in question. There is nothing, however, in this, in my opinion. If the action is for an infringement the proviso is satisfied, whatever defence the Defendant may set up or omit to set up. It was admitted by counsel that the action would have been within the proviso if *Foster* could have pleaded that the patent is invalid, even though he had omitted to do so. But, in my opinion, it is equally within the proviso, though *Foster* does not plead invalidity, because he is incapacitated from doing so. If the action were in any sense a collusive one the case might be wholly different; but it is an honest action, brought hostilely against the only person threatened, being the only person whom *Day* knew to have infringed; for, whatever the truth may be as to any manufacture by *Barrett & Elers*, it was not referred to in any correspondence between the solicitors, nor at all until the statement of claim was delivered in *Barrett & Elers* v. *Day*; and it is not suggested that *Day* or his advisers had any materials before them which disclosed any ground of action against *Barrett & Elers.* Lord Justice *Cotton* says in *Challender* v. *Royle* (1), "It is my opinion, and I ought to express it, that in order to bring the case within this proviso the action must be an honest action, an action honestly brought in order to test the validity of the patent or the fact of infringement, whichever may be in question." And again (2), "In my opinion the proviso is satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person or any of the persons to whom the threats have been made." And, in my opinion, *Day's* action stands the application of this test.

I do not forget that *Barrett & Elers* allege in their statement of claim, after setting out the letter of the 17th of December, that since writing that letter the Defendant has continued the "said" threats, and has brought his action against *Foster.* In that pleading the phrase "the said threats" means the threat in the letter of the 17th of December. In his affidavit, filed on the 1st of November, *Day* swears that, except by the letters of the 25th of November and the 17th of December, neither he nor any person on his behalf has at any time made any threat in respect of *Barrett* and *Varley's* patent, and although this affidavit was replied to on the 6th of November by affidavits of *Foster* and of

(1) 36 Ch. D. 438.

(2) 36 Ch. D. 439.

the secretary of *Barrett & Elers*, *Day's* statement on this point is not contradicted. It may be that the non-withdrawal of that threat, coupled with the further correspondence between the solicitors, was in one sense a continuance of it down to the time of bringing the action; but it is obvious that the threat to bring an action came to an end when the threatened action was brought, and there is no suggestion by affidavit or pleading that any threat was ever made, except of bringing the action, or that subsequently to the date of commencement any threat was made at all. It follows, therefore, that the action must stand or fall by the letter of the 17th of December, which, in my opinion, for the reasons I have mentioned, gives no cause of action, unless it can be maintained upon the ground that *Day* may still fail to use due diligence in the prosecution of his action. But there has not been, in my opinion, any such failure down to the present time, and the action is set down and stands high in my list for trial; and, as nothing which *Day* can do can prevent its coming on in due course, no question as to its due prosecution can now arise.

But there is another matter which I cannot leave out of sight in considering whether the action of *Barrett & Elers* v. *Day* should now be stayed or not. Order xxv., rule 4 provides: "The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Independently of this order, the Court has undoubted jurisdiction to stay all proceedings, or dismiss an action, when on the facts proved to the satisfaction of the Court it appears that the action is frivolous and vexatious. (See *per* Lord Justice *Cotton* in *Willis* v. *Earl Beauchamp* (1); *Metropolitan Bank* v. *Pooley* (2); *Reichel* v. *Magrath* (3).) In my opinion, the prosecution of an action is vexatious when it is clear that no relief can be granted at the trial. The only relief sought in this case by *Barrett &*

(1) 11 P. D. 59, 60.
(2) 10 App. Cas. 210.
(3) 14 App. Cas. 665.

NORTH, J.
1890
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Elers is an injunction to restrain *Day* from threatening them, or their licensees or assigns, with reference to alleged infringements of *Barrett* and *Varley's* patent, and damages and costs. As regards the threat to bring the action of *Day* v. *Foster*, no injunction to restrain such threat could be granted at the trial, nor could have been at any time since the writ in *Barrett & Elers* v. *Day*, as no such threat was any longer possible after the action had been brought, and no damages could be recovered in respect of a threat which did not give rise to any cause of action. And, as regards any other threats, none are proved or alleged, nor is there anything from which any intention on the part of *Day* to make such threats could be inferred, and no injunction can be granted to restrain a defendant from doing an act which it is not proved or even alleged that he ever intended or threatened to do (see *Stannard* v. *Vestry of St. Giles, Camberwell* (1); *Proctor* v. *Bayley* (2)); nor could there, of course, be any damages for an act which was never committed. What *Barrett & Elers* avowedly desire to do is to try whether *Day's* patent is valid or not. But no such question can arise in their action under the circumstances I have mentioned, as there is no issue to which it can be relevant, although, no doubt, according to *Challender* v. *Royle* (3) and *Kurtz* v. *Spence* (4), such question might have arisen if any threatening or intention to threaten on *Day's* part was alleged and proved, and there was an issue to be decided at the trial whether such threatening was justifiable or not.

Under these circumstances I am of opinion that there is not, and never was, any cause of action in *Barrett & Elers* v. *Day* in respect of which relief can be granted at the trial, and that, this being so, the action is vexatious and the proceedings therein should be stayed, and I accordingly direct such stay, and that the Defendant *Day's* costs should be paid by the Plaintiffs. In deciding that it is vexatious I do not mean to impute to the Plaintiffs therein that it was commenced for the purpose of annoyance. I have no doubt it was considered a legitimate move in the war game of litigation between the parties. But this is no reason why the Defendant should be harassed by the continuance of proceedings which, in my opinion, cannot result in a decision in the Plaintiffs' favour.

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(1) 20 Ch. D. 190.
(2) 42 Ch. D. 390.
(3) 36 Ch. D. 425.
(4) Ibid. 770.

Foster's summons in *Day* v. *Foster* seeks to have all proceedings in that action stayed until after the trial of the other action. I see no reason whatever for this. No question as to threats or as to the validity of *Day's* patent can be tried in the action against *Foster*, but that is the proper action in which to try whether the articles which *Foster* has made are or are not infringements of *Day's* patent. The questions in the two actions are entirely different. *Foster's* affidavit in support of his summons says that if what he asks is granted he is willing to be bound by the decision in *Barrett & Elers's* action, so far as the issues as to validity and infringement are concerned. Inadvertently he lets out that what he is really seeking is to impugn the validity of *Day's* patent—a thing which he has expressly contracted for valuable consideration that he will not do. I consider such an attempt not creditable to him and vexatious in every sense, and I dismiss his summons with costs.

Solicitors: *A. E. Sydney; Gard, Hall, & Rook.*

D. P.

STIRLING, J.
1889
Nov. 29; Dec. 13, 21.

POSTLETHWAITE *v.* PORT PHILLIP AND COLONIAL GOLD MINING COMPANY.

[1889 P. 2189.]

Voluntary Liquidation of Company and Reconstruction—Companies Act, 1862, s. 161 [*Revised Ed. Statutes, vol. xiv., p.* 237]—*Limitation of Time for Application for New Shares.*

The *P. P. and C. Gold Mining Company* passed resolutions for a voluntary winding-up with a view to reconstruction, and appointed a liquidator who was authorized (1) to sell the property to a new company for a consideration to be paid in shares; (2) to procure to be allotted to every member of the *Old Company* requiring the same, as his nominee under the contract, two shares for every share held by him in the *Old Company*; provided that to entitle the members of the *Old Company* to an allotment of new shares application must be made for the same in writing in the form prescribed by the liquidator accompanied by a payment of 6*d.* per share on the number of shares applied for within ten days next after notice requiring him to apply for the same should have been given in the manner in which notices were required to be given to members under the articles of association of the *Old Company*; and he was directed (3) to dispose of so many of the 200,000 shares as should be in excess of the number to which the members of the *Old Company* would if they all applied for the same be entitled, and also of the shares for which applications were not made within the time and on the terms mentioned; and in making such disposition of the shares he should not be treated as a trustee for the members of the *Old Company* or for the *New Company*, but should have full discretionary power of selling the same to any person at such prices and on such terms as he might think fit, and it should not be necessary to first offer such surplus shares to the shareholders of the *Old Company*, and the *New Company* should be entitled to retain all shares not applied for and taken by the liquidator or his nominees within three months after the incorporation of the *New Company*. If the liquidator should obtain any premium for the shares to which members of the *Old Company* other than dissentients would have been entitled had they applied for the same, as mentioned, such premiums less the costs of realization should belong to such members. A contract was entered into between the *Old Company*, the liquidator, and a *New Company*, and it contained stipulations as to the sale.

On the 12th of June a circular was sent to the shareholders in the *Old Company*, of whom the Plaintiff was one, requiring an application and deposit on or before the 25th of June. The Plaintiff did not attend any of the meetings, but he did not dissent from the resolutions passed. He did not send in any application until the 24th of August, 1889, and at that time the liquidator had carried into effect the arrangements, and was consequently unable to give him any shares. The Plaintiff commenced an action in October, 1889, and a motion was made on his behalf for in effect an injunction to restrain the Defendants from carrying the agreement into effect:—

Held, that the resolutions were not *ultra vires* or otherwise invalid, and motion consequently refused.

THIS was an action by *Theodore Postlethwaite* on behalf of himself and all other the shareholders in the *Port Phillip and Colonial Gold Mining Company, Limited*, which was in liquidation, and the Defendants were that company (hereafter called the *Old Company*); *J. H. A. Smith*, the liquidator of the *Old Company*; and the *Port Phillip Gold Mining Company, Limited* (hereafter called the *New Company*), and it came on to be heard upon a motion which, as amended by leave given on the 29th of November, 1889, was for an injunction to restrain the *Old Company* and the liquidator and each of them from conveying any of the estates of, and dealing with, or in any way disposing of any of the assets and property of the said company until the trial or further order; and that the Defendants, the *New Company*, might be restrained from dealing with or disposing of any part of the assets of the Defendants, the *Old Company*, as had already been transferred to the *New Company*, otherwise than in the ordinary course of business, until trial or further order. The *Old Company* was incorporated in 1852 under the Statutes 7 & 8 Vict. c. 110, and 10 & 11 Vict. c. 78 and registered, and in 1853 the company obtained a royal charter which confirmed their deed of settlement. The provisions of the deed were amended from time to time by the Board of Trade, and in 1868 the company was incorporated with limited liability under the *Companies Act*, 1862. From 1857 down to 1881 the mines proved a great success. From 1881 they were worked at a loss. The original capital was £500,000 in shares of £5 each, and in 1869 it was reduced to £200,000 in shares of £2 each. The shares were afterwards reduced to 25*s.* each, 24*s.* of which had been paid up, and there remained a liability of 1*s.* a share on 97,542 shares. The Plaintiff was the holder of 1978 shares in the *Old Company* which, early in the year 1889, found itself in want of additional capital. With the view of securing that capital certain shareholders were of opinion that a voluntary liquidation and reconstruction should be determined upon, and accordingly on the 28th of January 1889, a resolution was passed that the *Old Company* should be wound up voluntarily. On the 18th of February, 1889, that resolution was confirmed and Mr. *J. H. A. Smith* was appointed liquidator.

The Plaintiff gave his proxy in support of the resolution. On the 2nd of April, 1889, the liquidator issued a circular calling an extraordinary meeting of the shareholders for the 12th of April, 1889, for the purpose of authorizing him to sell the property on such terms as might be deemed expedient, or if thought advisable of passing resolutions there set out with or without modifications. At the meeting upon the 12th of April, 1889, resolutions in a somewhat modified form were passed, and the first of them was, shortly, in the following terms:—

"That the liquidator be and he is hereby authorized and directed to sell and transfer to a *New Company* to be incorporated with limited liability under the *Companies Acts*, 1862 to 1886, all and singular the lands . . . . and all other property and effects of this company upon the following terms and conditions . . .

(*a*.) "The name of the *New Company* shall be such as the liquidator may approve, and he may assent to the adoption by the *New Company* of the same, or a similar name to that of this company, and the nominal capital thereof shall be £50,000 in 200,000 shares of 5*s*. each with the usual power to increase and reduce the same. The memorandum and articles of association of the *New Company* shall also be subject to the approval of the liquidator.

(*b*.) "The consideration of the said sale and transfer shall be:—The payment of the sum of £20,000 by the allotment to the liquidator or to his nominees of 200,000 shares of 5*s*. each in the *New Company* credited with 2*s*. paid thereon, and leaving a liability of 3*s*. per share, and no more, and the payment and satisfaction by the *New Company* of any sums which may become payable to any shareholders of this company who have dissented under the *Companies Act*, 1862."

The 2nd resolution was:—"That the liquidator be and he is hereby authorized and directed to procure to be allowed to every member of this company requiring the same, as his nominee under the contract hereinafter mentioned, two shares in the *New Company* with 2*s.* credited as paid thereon, for and in respect of every share held by him in this company. Provided always that to entitle the members of this company to an allotment of such new shares, application must be made for the same in writing in the form and manner prescribed by the liquidator, accompanied by a payment of 6*d.* per share on the number of shares applied for, within 10 days next after notice requiring him to apply for the same shall have been given in the manner in which notices are required to be given to members under the articles of association of this company."

The 3rd resolution was:—"That the liquidator be and he is hereby directed to dispose of so many of the said 200,000 shares as shall be in excess of the number to which the members of this company would, if they all applied for the same, be entitled, and also of the shares for which applications are not made within the time and on the terms aforesaid; and in making such disposition of the said shares the liquidator shall not be treated as a trustee for, or in any fiduciary relation to the said members or to the *New Company*, but shall have full discretionary power of selling and transferring the same to any person or persons at such prices (if any) and on such terms and conditions as such liquidator may think fit, and it shall not be necessary to first offer such surplus shares to the shareholders of this company, and the *New Company* shall be entitled to retain all shares not applied for and taken by the liquidator or his nominee within three months after the incorporation of the *New Company*. If the liquidator shall obtain any premium for the shares to which members of this company other than such dissentients would have been entitled had they applied for the same as aforesaid, such premiums, less the costs and expenses of realization, shall belong to such members."

The 4th resolution was in effect:—"That the liquidator be authorized to enter into a contract" with the *New Company* for carrying into effect the arrangement embodied in the aforesaid resolutions; and the 5th was to the effect "that the liquidator be authorized to enter into a contract with any person or persons for the purpose of obtaining subscriptions" for any such shares on such conditions as the meeting might direct, and in default of such direction upon such terms as he might think expedient . . . The draft of a contract to be entered into between the *Old Company*, the liquidator, and the *New Company* for the purpose of carrying the foregoing resolutions into effect was submitted to the meeting, and approved with power to modify the same, and the contract which was ultimately settled, and which was executed on the 16th of July, 1889, was in accordance with the draft which was laid before that meeting. It contained a recital of the resolutions for the voluntary winding-up; and of the resolutions which were passed at a meeting in April. Then it contained stipulations as to the sale, and it provided in particular in clause 3 that the *New Company* "shall pay in addition to the purchase-money to the liquidator a sum sufficient to cover the costs of and incidental to the scheme for the sale of the property; the formation and registration of the *New Company;* the preparation and carrying out of this and every other necessary contract, and of such verification of the title of the *Old Company* to the leases, claims, and other property sold as the *New Company* shall consider necessary, and shall also pay such cost of keeping the mines free from water and other outgoings at the mines as from the 31st of March last (1889), and any sum or sums of money which the liquidator may have paid or contracted to pay as commission for underwriting, selling, or disposing of the shares to which he may be entitled under this contract or any of them." Then by clause 5 the liquidator was to have the right from time to time during the period of three calendar months from the date of the agreement to nominate the person or persons to whom the said 200,000 shares should be allotted. Every such nomination should be in writing under the hand of the liquidator and should be left at the registered office of the *New Company*. Then clause 6 provides: "If the said liquidator shall not apply for the whole of the said shares within the said period of three calendar months from the date of this agreement as aforesaid the *New Company* shall have the right by notice in writing to require the liquidator to apply for the same either in his own name or in the names of responsible persons within 14 days"; and "If the liquidator shall fail to apply for such shares as aforesaid within that period the shares not so applied for shall be at the disposal of the *New Company* and may be accordingly sold, allotted, and disposed of by the *New Company* to any person or persons for such consideration as the directors of the *New Company* may think fit and the law may allow." Then there was a proviso that the liquidator was to keep the mines free from water and continue the works and carry on the business of the *Old Company*. Clause 12 provides that, "The said liquidator shall not by reason of anything herein contained be under any personal liability in respect of any shares to which he may be entitled or may have claimed under this agreement, except such shares (if any) as may be actually allotted to him at his request." The resolutions of the 12th of April were confirmed at an Extraordinary General Meeting of the members held on the 29th of April, 1889. On the 8th of June, 1889, the *New Company* was incorporated. On the 12th of June the liquidator issued a circular to the members of the *Old Company* of which the material points were as follows:—

"I have now the pleasure to inform you that the *New Company*, called '*The Port Phillip Gold Company, Limited*,' has been incorporated under the *Companies Acts*, 1862, 1886, with a nominal capital of £50,000, in 200,000 shares of 5*s.* each, every shareholder in this (the old) company being entitled to apply for, and have allotted to him, two shares of the *New Company* of 5*s.* each (credited with 2*s.* per share as paid thereon, and leaving a liability of 3*s.* per share) in respect of each share held by him in the *Old Company*. I have also much pleasure in stating, that in pursuance of the powers and instructions given me at the abovementioned meetings, I have entered into an arrangement with the *Gold Trust and Investment Company, Limited*, who for a payment of 3*d.* per share have guaranteed to find subscribers for the whole of the shares (if any) which may not be taken by the shareholders. By this arrangement subscriptions for the whole of the new capital are assured without any necessity for advertising or offering shares to the public, &c., with the attendant expense and delay. In accordance with the rights reserved to the shareholders" of the *Old Company*, "I now beg to offer you an allotment of —— shares of and in" the *New Company* "in respect of ——

shares held by you in this company . . . provided application be made for the same in writing, accompanied by a payment of sixpence per share on the number of shares applied for, and that the said application and deposit be received by the *Imperial Bank*" . . . on or before the 25th day of June instant. "If no application is received from you on or before the said 25th day of June instant, or so far as any application may not extend, you will be deemed to have refused an allotment of shares in the *New Company* to which you are entitled under the said special resolutions and draft contract, and you will be excluded from an allotment accordingly. Any shares unapplied for will be disposed of by me, as liquidator, to such person or persons, and at such price, and on such terms and conditions (if any) as I may think fit."

With that circular were sent forms of application for shares in the *New Company*, and subsequently a further circular or notice to shareholders was issued giving instructions as to the mode of filling up the forms of application; and the notice contained the following clause:—

"Any shareholder from whom an application and deposit shall not have been received by the bankers above-named on or before the 25th of June instant shall be deemed to have declined the shares not so applied for, and will thereupon absolutely forfeit his or her right to an allotment. The time for the receipt of application cannot be extended."

The Plaintiff was a stockbroker on the *London Stock Exchange*, and appeared to have regularly attended to his business down to the 17th of June, 1889. From the 17th of June to the 24th of August he was compelled to absent himself from business by domestic affliction. The Plaintiff did not attend any of the meetings of the company above referred to, but he did not dissent from the resolutions passed at them. It was proved that the notices of the meetings of the 12th and 29th of April and the circular of the 12th of June were duly sent by post to the Plaintiff at his registered address, viz., the *London Stock Exchange*, in accordance with the provisions of the articles of association of the *Old Company*. In answer to that the Plaintiff stated that he had no recollection of having seen any of the circulars except a notice and forms of application, which were proved by the evidence on behalf of the liquidator to have been posted along with the circular of the 12th of June, and that to the best of his knowledge and belief no other circular was ever received at his office. The Plaintiff, however, admitted that in June, 1889, and shortly before the 17th day thereof, the liquidator called on him at the door of the *Stock Exchange* and asked him how many shares in the *New Company* he would be willing to take up, and that he told him he intended to take up his proportion, but no more. The Plaintiff did not in fact send in any application by the 25th of June, but on his return to business on the 24th of August he filled up the form of application and sent it to the liquidator. At that time, however, the liquidator had carried into effect the arrangements mentioned in the circular of the 12th of June, and was consequently unable to give him any shares. After some correspondence between the solicitors of the Plaintiff and the liquidator, this action was commenced on the 9th of October by writ, which claimed—1st, against all the Defendants a declaration that the agreement, dated the 12th of July, 1889, and made between the *Port Phillip and Colonial Gold Mining Company* of the one part, *J. H. A. Smith* of the second part, and the *Port Phillip Gold Company* of the third part, was *ultrà vires* as regarded the Defendants, the *Port Phillip and Colonial Gold Mining Company*, and was inoperative and void, and that such agreement should be delivered up to be cancelled. 2nd, an injunction to restrain the *Port Phillip and Colonial Gold Mining Company* and its liquidator from carrying the said agreement into effect. 3rd, alternatively that the Defendant *J. H. A. Smith* might be restrained from carrying into effect the said agreement except upon allotting or causing to be allotted to the Plaintiff 3974 shares of 5*s.* each of the capital of the *Port Phillip Gold Company* issued as credited with 2*s.* paid thereon. 4th, alternatively that the said Defendant might be restrained from carrying into effect the said agreement except upon paying the Plaintiff the full value of his interest in the said shares in the manner provided by sect. 161 of the *Companies Act*, 1862. 5th, alternatively a declaration that the rights and interests of the Plaintiff in respect of 1987 shares held by him in the *Port*

Phillip and Colonial Gold Mining Company might be ascertained and for proper directions for realizing and paying him his share of the assets of that company. 6th, an injunction to restrain the Defendants, the *Port Phillip and Colonial Gold Mining Company*, and the Defendant *Smith*, from parting with the assets of that company to the Defendants, the *Port Phillip Gold Company*. 7th, costs.

A notice of motion framed in accordance with the second of the alternative claims was given, but it was afterwards, by leave given on the 29th of November, amended, and the motion now made was in the terms set forth above.

Hastings, Q.C., and *Farwell*, for the Plaintiff:—

The notice given by the liquidator in April was bad: *Alexander* v. *Simpson* (1). The company had no power to alter the rights of the shareholders under the memorandum and articles of association by any resolution which purported to have that effect under sect. 161 of the *Companies Act*, 1862: *Griffith* v. *Paget* (2). The liquidator had no right to fix a time within which the shareholders could apply for shares, and say to them that if they did not do so they should lose all right to the shares. That was a novel transaction. The authority which was given by the company to the liquidator was absolutely *ultrà vires*. The whole scheme was vitiated. The Plaintiff never in any way assented to it, and never agreed to release the liquidator, who was a trustee for him. The provisions of sect. 161 (3) should have been strictly pursued. That the purchasing company was bound to see to, as a petition presented within a year would make the whole transaction void. The resolutions were part of the title of the *New Company*, and they had not yet got a legal one. There was no estoppel. Delay might be urged, but that was beside the mark, as a correspondence was going on through the Long Vacation, and the writ was issued on the 9th of October. The Plaintiff was not debarred by any act of his own. He had been passive, and not active: *Clinch* v. *Financial Corporation* (1). Sect. 161 merely enabled the liquidator to substitute shares and other things for cash as the property which he was to distribute amongst the shareholders, but here the liquidator contended that he might fix a time for the application to be made, and if not made that he would forfeit the shares and give them to other people. That was a monstrous contention. There was a strong *primâ facie* case in favour of the Plaintiff, and his application should, as submitted, be granted.

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(1) 43 Ch. D. 139.

(2) 5 Ch. D. 894.

(3) Sect. 161 enacted that "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the

Grosvenor Woods and *D. M. Kerly*, for the liquidator and the *Old Company*:—

The scheme proposed has been adopted by many of the judges. Sect. 161 is very wide in its terms. The liquidator could take

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liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned . . . no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court such resolution shall not be of any validity unless it is sanctioned by the Court."

(1) Law Rep. 4 Ch. 117.

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shares, policies, and any like interest in the *New Company*. He was not obliged to sell for money, but the shareholder was not bound to take the new shares whether he liked them or not: *Higgs's Case* (1); *In re City and County Investment Company* (2). Quite apart from authority, it is perfectly clear that the liquidator could sell to the *New Company*, and limit a time within which the shareholders should come in with their application for shares: *Zuccani* v. *Nacupai Gold Mining Company* (3); *Palmer's* Company Precedents (4); *Healey's* Companies Law and Practice (5). If a time could not be limited the action of the liquidator would be paralyzed, particularly in a case like this, where new capital was urgently wanted to save the mines from ruin. The refusal of a shareholder to take shares could not invalidate the scheme. The liquidator would be entitled to place the shares and pay a sum for that purpose. There was nothing inherently *ultrà vires* in doing that. The decision in *Griffith* v. *Paget* (6) does not apply here. There was no inequality in this case, and nothing to invalidate all the scheme which was within sect. 161. *Southall* v. *British Mutual Life Assurance Society* (7). When the resolution was confirmed in April was the time for the Plaintiff to complain of *ultra vires*, but he did nothing until a long time afterwards, and then he said he wanted his shares under the scheme; but now it was contended that the agreement should be declared void. The Plaintiff has stood alone. There have been large dealings in the shares of the *New Company*, and the Court will not, as submitted, at the instance of a single shareholder impeach the transaction on the ground of its being *ultrà vires*. This case is altogether different from *Clinch* v. *Financial Corporation* (8), where the whole scheme was held to be bad. The Plaintiff's own acts were sufficient to shew that his application should be refused.

[*Rivington's Case* (9) and *In re Southport and West Lancashire Banking Company* (10) were also referred to.]

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(1) 2 H. & M. 657, 665.
(2) 13 Ch. D. 475.
(3) 61 L. T. (N.S.) 176; 1 Megone, 230.
(4) 4th Ed. p. 587.
(5) 2nd Ed. pp. 360–366.
(6) 5 Ch. D. 894.
(7) Law Rep. 6 Ch. 614.
(8) Law Rep. 4 Ch. 117.
(9) 17 S. J. 403–406.
(10) 31 Ch. D. 120.

Buckley, Q.C., and *Hart*, for the *New Company*:—

If the objections on the part of the Plaintiff are held to be good, sect. 161 will be unworkable. It will be conceded that it is not competent to distribute assets to some shareholders to the detriment of others: *Griffith* v. *Paget* (1); but that case has no application to the present. This scheme is clearly within sect. 161. The liquidator could sell for shares for the purpose of distribution amongst the shareholders. He offered shares to a particular shareholder who did not take them within the time, a reasonable period, and what was the natural result? The liquidator's duty was to sell them. It was only reasonable for the *New Company* to say that the election to take shares should be exercised within a limited time, and if not that the liquidator should find a purchaser who would pay 3*s.* a share. There was nothing in the Act of Parliament to forbid what was done. All was within sect. 161, and if that should be held to be not the interpretation of the section, it will be impossible to carry out a scheme under it. A limit of time is not only good, but the Court will not do anything which is inconsistent with it: *Weston* v. *New Guston Company* (2); *Zuccani* v. *Nacupai Gold Mining Company* (3) no objection can be properly taken to the limit of time or to the payment of 3*d.* a share. *Llanrwst Lead Mining Company, Limited* (4); *Lindley* on Company Law (5).

Hastings, in reply:—

As to the practice which prevails that is not so general as alleged on behalf of the liquidator. The forfeiting of shares must be *ultrà vires.* The liquidator can have no difficulty in knowing what to do, because he can come to the Court, and ask for directions how to deal with the shares. There is not a word in sect. 161 as to shareholders being obliged to express within a certain time their willingness to take shares in the *New Company*, and the argument as to the scheme being unworkable if a time be not limited fails.

(1) 5 Ch. D. 894.

(2) 1 Megone, 225, and on appeal 1 Megone, 352.

(3) 61 L. T. (N.S.) 176.

(4) Palmer's Co. Prec. 4th Ed. pp. 618, 619.

(5) 5th Ed. pp. 894–896.

1889. Dec. 21. STIRLING, J.:—

After stating the action, and the motion said: The object of the motion is to test the validity of an agreement for sale by the *Old Company* of the assets of that company to the *New Company.* That agreement purports to have been entered into under the provisions of sect. 161 of the *Companies Act*, 1862, and all parties are willing that I should deal with the case, so far as I can properly do so, as if this were the trial of the action, instead of being merely an interlocutory application. The facts which gave rise to the application are shortly these. [His Lordship then fully stated the facts above set forth; and after saying that the 3*d.* per share would be payable by the *New Company* under the stipulations of the agreement which he had read, continued:—] Under these circumstances, I think it must be assumed that the notices and circulars were duly received at the Plaintiff's office, and that previously to the 17th of June he was, or with reasonable diligence might have been, aware of the obligation which lay upon him under the special resolutions of April to send in an application for shares by the 25th of June. [His Lordship, after referring to the writ, and the Plaintiff's claims therein, and the original, and amended notices of motion, continued:—] The *New Company* has allotted all its capital, in accordance with the agreement with the *Old Company*, and has been put in possession of the property of the *Old Company*, though a legal conveyance has not actually been made. Two objections were urged against the Plaintiff's right to relief—first, it was said that the resolutions and agreement were within the powers of the *Old Company* and were valid, and secondly, that even if they were not, the Plaintiff was debarred from relief by delay and acquiescence. In support of the first of these objections it was urged that the shares to be received in compensation for the sale to the *New Company* were not for the purpose of distribution among the members of the *Old Company* within the meaning of sect. 161. It was not disputed before me, and it was shewn by the case of *In re City and County Investment Company* (1), before the Court of Appeal, that a sale may be made for shares to which a liability attaches, and further, that in such a case the new shares

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(1) 13 Ch. D. 475.

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may be given directly to the shareholders of the *Old Company*, and need not in the first instance go to the liquidators, the reason being, as was stated by the late Master of the Rolls (Sir *George Jessel* (1)), that "it is perfectly well-known that the liquidator will not take shares which are not fully paid up." On the other hand, it was decided in *Higgs's Case* (2) that a shareholder, even although he has not expressed his dissent from the special resolution sanctioning the sale, cannot be compelled to accept the shares, in the *New Company* against his will. How then are shares to which a liability is attached, which the liquidator will not take, and which the shareholders cannot be compelled to accept, to be distributed among them pursuant to the 161st section? The answer is by giving to every shareholder, who does not dissent, what in substance amounts to an option to take shares in the *New Company*; and if the scheme under consideration had been framed in that simple form, I conceive its validity could not (regard being had to the decisions to which I have referred) have been open to question. If the shareholder fails to exercise his option the result is that he loses all interest in the shares which he might have taken, but is bound by the resolutions which have been passed. That was laid down by Lord *Hatherley* (when Vice-Chancellor) in *Higgs's Case* (3) where he said: "Unless he dissents within the time and in the manner specified by the Act of Parliament, he is so far bound that he can get nothing else for his own shares, except these new shares, but he is not bound to take such new shares whether he likes them or not. He may have lost all his rights over his own shares by his delay; but he may nevertheless decline to take this consideration for his shares if he thinks that that consideration would prove burdensome rather than beneficial. He may get nothing for his property—that is his loss; but, unless he has compromised himself by some act of his own, he cannot be compelled to incur any further liability." The same view of the law was expressed by the same learned Judge in *Clinch* v. *Financial Corporation* (4) where he said (5): "Now it is clear that the

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(1) 13 Ch. D. 482.
(2) 2 H. & M. 657.
(3) 2 H. & M. 665.
(4) Law Rep. 5 Eq. 450.
(5) Law Rep. 5 Eq. 472, 473.

161st section points to this: that if a company be desirous of merging themselves in another company, inasmuch as a minority of dissentient shareholders cannot be compelled to take shares in the other company, it may be desirable that the first company shall have a power of closing its concerns and winding up its affairs, and upon so doing of selling its assets to the other company, which may be disposed to purchase those assets, paying for them in shares. Then it would be for the shareholders in the company which was being wound up to say whether they will take shares or not. If they refuse to take shares, they lose all interest in the purchase-money: they are so far bound by the resolution of their own company as to lose all right of claiming any portion of it; but the sale may still be a good sale of the concern by one company to the other."

That being so, it is next to be considered within what time the option is to be exercised. It seems clear that it cannot remain open for ever. The distribution contemplated by sect. 161 must take place before the close of the winding-up, in the course of which the sale is made. It was said that the option ought to remain open until the liquidator has obtained, under sect. 138, the direction of the Court as to any shares which a shareholder who has not dissented has abstained from accepting. The liquidator may, no doubt, if he sees fit, protect himself by an application to the Court in reference to the distribution of the shares; but I see nothing which renders it obligatory on him to take such a course. All that seems to be incumbent on him to do is to take care that each shareholder has afforded to him reasonable opportunities of obtaining, if he be so minded, the shares intended for him; and if, having done that, the liquidator is able to wind up the affairs of the company and close the liquidation without recourse to the Court, he appears to me to be entitled to do so. The question, however, affects not only the selling company, but also the purchasing company. Every company is interested in knowing who constitute the body of its own shareholders, more particularly when a liability attaches to the shares. In the present case the company, having been formed to work a gold mine, was of a highly speculative character, and the liability attached to the shares was intended to furnish the means of obtaining the capital necessary for working the mine. Under these circumstances it was only reasonable for the purchasing company to stipulate and for the liquidator and shareholders of the selling company to agree that a limited time should be fixed within which alone the option should be exercisable; and I see nothing in sect. 161 (as interpreted by the decisions to which I have referred) to prevent this from being done. In my opinion, therefore, the scheme was not vitiated by the insertion of a limit of time within which the option was to be exercised, provided the limit was such as to leave the option available for a reasonable time. I am confirmed in this conclusion by such authority as is to be found on the point. In the first place, schemes containing similar clauses as to a limit of time are shewn to have been repeatedly sanctioned by the Court. It is true that in no case does the point appear to have been formally adjudicated upon. Nevertheless, I cannot think that it entirely escaped observation, and it appears to me that some weight is due to the circumstance that such clauses were passed without objection by Sir *G. Jessel* in the case of *Southport and West Lancashire Banking Company* (1) and Vice-Chancellor *Hall* in the case of *Llanrwst Lead Mining Company, Limited* (2). Next, I have said that if the scheme had been framed so as simply to give each shareholder an option without limiting any time for its exercise, it is difficult to see how objection could have been taken to it. Now, in the case of *Zuccani* v. *Nacupai Gold Mining Company* (3), Lord Justice *Fry* laid it down (4) that, no time being limited by the scheme then under consideration for the exercise of the option, it must, as a matter of law, "be exercised within a reasonable time." The reasoning which led the Lord Justice to that conclusion appears to me to be applicable to the present case, and to shew that here also the option, if no time had been prescribed for the exercise of it, must have been exercised within a reasonable time. If this be so, it seems to me that the scheme cannot be vitiated merely by the circumstance that the scheme itself fixed that reasonable time. It was said, however, that in *Nicholl* v. *Eberhardt Company* (1) the Court of Appeal had expressed a doubt as to the validity of such stipulations. In that case, however, the limit of time was left to be determined, not (as here) by the liquidator of the old company, but by the directors of the new company, and it was provided that all shares which should not be applied for within such time should be at the disposal of the new company, the latter being a different provision from that which is found in the present case. Even there, however, as I read the judgments delivered in the Court of Appeal, no great weight appears to have been given to the objection which was raised to the limitation of time for the exercise of the option which was finally decided to be valid; the objection, which was felt to be serious, being that to the second of the provisions which I have mentioned. In the present case it was not suggested, or at all events it was not proved, that the limit of time which was ultimately fixed by the liquidator was unreasonable, and in my opinion the first and second resolutions were not beyond the powers of the company.

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(1) 31 Ch. D. 120; Palmer's Co. Prec. 4th Ed. p. 587.

(2) Palmer's Co. Prec. 4th Ed. p. 618.

(3) 61 L. T. (N.S.) 176.

(4) 61 L. T. (N.S.) 180.

Then is the third resolution invalid? I think not. It appears to me, when carefully examined, to be really for the benefit of a shareholder who does not exercise the option given to him. Such a shareholder not exercising the option reserved to him would, according to *Higgs's Case* (2), and the decision of the Court of Appeal in *Weston* v. *New Guston Company* (3), lose all his interest in the shares of the purchasing company; but instead of this, a further chance of benefit is given to him by the provisions of the third resolution. This resolution, in effect, provides that the liquidator shall (without coming under any legal obligation so to do) be at liberty to make the most of the option on the shareholder's behalf, accounting to him for any premium he receives, less the costs and expenses of realization. No loss or liability is thrown on the shareholders of the old company, for by clause 3 of the agreement any expenses incurred by the liquidator are to be borne by the new company; while any benefit which may result from the dealings of the liquidator comes under these resolutions to the shareholder, even though he may not have exercised his option. In my opinion the scheme is, in substance, one for the distribution among the shareholders (who do not dissent) of shares to which liability attaches, and is within the terms of sect. 161 of the *Companies Act*, 1862. In coming to this conclusion I conceive that I am not departing from anything decided or laid down in *Griffith* v. *Paget* (1). In that case there was an attempt to distribute the shares which constituted the consideration for the sale in a different way from that in which a money consideration would have been divided, so that some of the shareholders would have been deprived of property to which they were entitled. That was held to be invalid. In this case there is not in the resolutions, as I read them, any such attempt. There is no interest conferred on assenting shareholders of which non-assenting shareholders are attempted to be deprived; on the contrary, the utmost appears to have been done for their benefit.

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(1) 61 L. T. (N.S.) 489.

(2) 2 H. & M. 657.

(3) 1 Megone, 352.

I think it unnecessary to express an opinion on the second objection beyond this, that it appears to be open to serious doubt whether a shareholder who previously to the 17th of June expressed his willingness to take up his proportion of shares, and who on the 24th of August sent in an application for those shares, and who did not previously to the 9th of October challenge the validity of the resolutions, is not precluded from claiming relief founded on their invalidity, in a case where those resolutions have been acted upon to the extent which here appears.

It was ordered that the motion be treated as the trial of the action, so far as the action was based upon paragraphs 1, 2, and 6 of the writ, and that the action be dismissed, with costs, entirely as regarded the new company and partially as regarded the old company and the liquidator.

Solicitors: *Snell, Son, & Greenip; Michael Abrahams, Son, & Co.; Kerly, Son, & Verden.*

T. F. M.

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(1) 5 Ch. D. 894.

C. A.
1889
KEKEWICH, J.
July 9, 10.
C. A.
Dec. 16.

MYERS *v.* CATTERSON.

[1887 M. 5103.]

Light and Air—Railway Company—Sale of Surplus Lands with House thereon—Implied obligation to Purchaser—Access of Light through Railway Arches—Interference with Light by Person claiming under Company.

A railway company sold a piece of their surplus land to the Plaintiff, together with a house, which they had allowed him to erect thereon. The house was close to their line of railway, which there ran over a series of arches, through two of which there was some access of light to two of the lower windows of the Plaintiff's house. The company retained in their own hands lands on the other side of the railway opposite the Plaintiff's house; and their conveyance to him contained a recital that all the land acquired by them other than that sold to the Plaintiff would be required by them for the construction of their railway, and it contained no express grant of right, or covenant as to light.

The Defendant's predecessor in title afterwards acquired from the company, under a conveyance subject to any right of light which the Plaintiff might have, the fee of the lands opposite the Plaintiff's house, and erected buildings thereon, and he also took a lease of the arches. The Defendant subsequently acquired this property, and blocked up the openings of the two arches nearest the Plaintiff's house with hoardings.

Held, that the company, on selling a portion of their surplus lands to the Plaintiff, had entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with the Plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway; and that, the hoarding not being for that purpose, a mandatory injunction ought to be granted.

Judgment of *Kekewich*, J., affirmed.

APPEAL from Mr. Justice *Kekewich*.

In 1863, the *London, Chatham, and Dover Railway Company* sold to the Plaintiff, *Myers*, a piece of their surplus land, with a house which they had allowed him to erect thereon, situate in *Newington Causeway*, on the south-western side of their line of railway, which there ran over a viaduct supported by a series of brick arches, each of which formed a sort of short tunnel across and below the line.

The edge of the viaduct carried by these arches was originally about thirty-seven feet from the Plaintiff's house, but in 1866, the line was doubled, so that a distance of only eight feet intervened between the house and the two arches opposite to it. These two arches or tunnels were about fifty-eight feet through to the other side, and while but little light reached the lower windows of the house facing the railway, from over the railway parapet, the evidence shewed that some light at all events reached them through these arches or tunnels.

The railway company retained in their own hands the land adjoining the property sold, and also held land partly covered by a building, and partly vacant, situate on the other side of the line, and opposite the Plaintiff's house.

The conveyance from the railway company to the Plaintiff contained no express grant of any right to light, nor any covenant or agreement as to light, but it contained a recital that all the land which had been acquired by them, except that which they were selling and on which the house had been built, would be actually required by them for the construction of their railway.

In 1872 *Isaacs*, the predecessor in title of the Defendant *Catterson*, acquired from the railway company the fee of the land on the north-eastern side of the railway opposite the Plaintiff's house, taking a conveyance thereof subject to any right of light which the Plaintiff might have, and he also took a lease for 1000 years of the arches.

In November, 1887, the Defendant, having bought from *Isaacs* both the land and the lease, erected buildings on the north-east side of the railway and a short distance from the arches; and in December following he blocked up the openings of the two arches, on the side nearest the Plaintiff's house, with hoardings. These arches had, since 1872, been used for the storage of machinery which more or less obstructed the passage of light through them.

These hoardings, as the Plaintiff alleged, materially obstructed the access of light to the windows of his house, and particularly to the windows of a back sitting room on the ground floor, and of a kitchen on the basement which were substantially opposite one of the arches so obstructed, and he brought this action alleging that he had enjoyed access of light to these windows through the openings of these two arches since the year 1863, and claimed an injunction to restrain the Defendant from obstructing such light by the buildings on the north-eastern side of the railway or by the hoardings, and damages.

The Plaintiff died in 1888, the action was continued by his representatives, and was heard by Mr. Justice *Kekewich* on the 9th and 10th of July, 1889. The other material facts of the case will be found in the judgments of the Court.

Warmington, Q.C., and *Swinfen Eady*, for the Plaintiff.

Barber, Q.C., and *E. K. Corrie*, for the Defendant:—

There has never been a case of a right claimed by one man to have light passing through another man's land. It is quite different from light passing over land, and the Court will not extend the doctrine of protection to light. Whatever witnesses may say, light passing to a small room through an arch fifty-eight feet deep cannot be of such importance as to justify the interference of this Court. The Plaintiff's claim depends entirely on sect. 3 of the *Prescription Act* (2 & 3 Will. 4, c. 71), which does not extend to such a case.

KEKEWICH, J.:—

I do not intend to deal at large with the question which has been argued as a serious as well as a novel one, respecting light coming through a house, or through a building instead of over one, or over a vacant space. I can see that there is much room for argument with reference to circumstances which do not exist here, whether the claim to access of light is made under contract, express or implied, or under the statute. It seems to me unnecessary to pursue that subject here, because I am not dealing with a building in the vulgar sense of the word, and certainly not with a house. What I am dealing with is a tunnel, that is to say, a railway built upon arches making a hollow space underneath through which light can pass. It would seem to me monstrous to hold that a man is not entitled to shut out light coming over a vacant space, and yet that he might do so if that light comes through his neighbour's building between two columns with a lateral bar placed on the top, and unless the

Defendant is prepared to insist that light coming in that way cannot be protected, his argument as regards this particular case to my mind is worthless. Putting that out of the way, I also at the same time set aside the statute; not as being immaterial, nor as being a claim which, as at present advised, I should be disposed to say was unfounded; but I put it aside without further consideration, because I think that the other ground put forward is sufficiently strong to support the Plaintiff's case without reference to the statute.

The ground is this, that Mr. *Catterson*, the Defendant, or rather, his immediate predecessor in title, took his property subject to an obligation not to interfere with the light coming to the Plaintiff's house.

It has been truly said that the law on this subject is to be found expounded in the late case of *Birmingham, Dudley and District Banking Company* v. *Ross* (1). I of course do not wish to refer to my own judgment, but I refer to a passage which I quoted from Sir *George Jessel's* judgment in *Allen* v. *Taylor* (2), where he says: "Where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights." That is his statement, forcible as his statements usually were, of the law applicable to such a case as the present. I do not observe a single word in either of the judgments of the Judges in the Court of Appeal which in the slightest degree diminishes the force of his language. They repeat the same proposition in their own language. But then it is said that this restriction is imposed, that a man must take the house which is granted to him subject to any such use of the grantor's land as he might reasonably anticipate. That is stated in several passages of the judgments of the Court of Appeal; but I think, perhaps, more clearly in the judgment of Lord Justice *Bowen* than elsewhere. He says (3): "This presumption arises, that the grantor intends the grantee to enjoy so much light unobstructed as must under the circumstances have been assumed by both parties to be reasonably necessary for the fair and comfortable use of the premises which are the subject of the grant." There is nothing in that judgment to say that there is any absolute reservation, there is nothing to say that the implied obligation to preserve the grantee's light is to be impaired otherwise than the circumstances render reasonable as a matter of inference, so that any one looking back would be able to say that this must have been intended or contemplated as between the parties. That, it seems to me, was the limit meant by the Lords Justices. In that particular case the inference was drawn that the corporation, the common grantor, intended to build to any height that might be convenient, having regard to the situation, and the first grantee was unable to complain that the second grantee had used that power in such a way as to interfere with his lights. What is the argument here? That the grantee, Mr. *Myers*, must have assumed that as his house with the particular windows in question was opposite to a railway arch, the railway company intended sooner or later, by themselves or their tenants, to block up the light coming through the railway arch; and witnesses have been called to tell us what I suppose we all know, although perhaps it might be thought that one could not take judicial notice of it, that there are many railway arches let to tenants, who block them up and convert them to purposes of trade by so blocking them up and putting up hoardings with and without windows. Was there any reasonable presumption that that would take place? I might ask—was Mr. *Myers* reasonably bound to assume that the railway company intended to deal with their arches in that way? That it was a common practice then may be a fact. The evidence goes to shew that it was at that time. That it is still more common now is also a fact; but that is not the question. The question is, whether the railway company must be understood to have reserved that right. I see no covenant in that direction. I suggested to Mr. *Barber* the possibility of restriction on the railway company's powers of dealing with their arches for purposes other than those of their own undertaking—a point which may perhaps hereafter have to be further considered. At any rate, apart from that, looking at it from the opposite point of view—what I venture to call the common sense point of view, although Mr. *Myers* may have ventured to guess that the railway company or their tenants might be attempting to do such a thing—I think it is not reasonably necessary within the contemplation of the parties that this should be done. It might very well be supposed that the arch would always be left vacant, or, at any rate, only used in such a way as not to interfere with the access of light through it.

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(1) 38 Ch. D. 295.

(2) 16 Ch. D. 355, 357.

(3) 38 Ch. D. 313.

Getting rid of that point, and finding as I do that the implied obligation—I will take care to avoid the use of the words "implied grant"—the implied obligation on the part of the railway company and those claiming through the railway company, including of course the present Defendant, is not restricted by any such presumption as I have mentioned, I have then to see what the facts of the case are.

[His Lordship then examined and commented on the evidence, coming to the conclusion that the access of light to the small sitting-room had been interfered with so as to cause inconvenience to *Myers*, and that there had been no acquiescence on his part. His Lordship gave judgment for an injunction and an inquiry as to damages arising from the obstruction by the buildings on the north-eastern side of the railway. The Defendant to pay the costs of the action.]

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The Defendant appealed. The appeal was heard on the 16th of December, 1889.

Neville, Q.C., and *Russell Roberts*, for the Appellant:—

The learned Judge in the Court below based his decision chiefly upon the ground that the Defendant's predecessor in title took the property subject to an obligation not to interfere with the light coming to the Plaintiff's house. But there can be no implied grant of an undetermined right of light; in other words, there can be no implied grant of a light the amount of which remains to be determined by the grantors: *Birmingham, Dudley and District Banking Company* v. *Ross* (1). Grants by implication are not favoured by the Court, and all that can be implied is that after the grantor has interrupted the light to the full extent of his requirements he will not obstruct it any more.

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(1) 38 Ch. D. 295.

There is no evidence of injury by diminution, and there was no reasonable ground for expecting any light at all through these tunnels or either of them. At all events the buildings on the north-eastern side of the railway are too distant to have affected the light, and the inquiry ought not to have been granted.

The Plaintiff cannot succeed on the question of implied grant, and neither can he upon the question of prescription. There has not been an uninterrupted enjoyment of such light as could come through the tunnels, because from the first the arches in question have been continually blocked up, sometimes to the roof, by machinery, so that no material amount of light could have flowed through them. This case is totally different from *Presland* v. *Bingham* (1), where the obstruction was of a temporary and fluctuating character: and if the onus of proof lies on us we have discharged it. [They also referred to *City of London Brewery Company* v *Tennant* (2), and *Clarke* v. *Clark* (3).]

As to the evidence—that of the expert witnesses is clear and precise and in favour of the Defendant, while that given by the Plaintiff's witnesses (all of them unskilled) is extremely vague and unreliable. In cases of this description great weight is due to evidence based on actual experiment.

Warmington, Q.C., and *Swinfen Eady*, for the Respondents, having waived their right to the inquiry as to damages, were not called upon to argue.

Cotton, L.J.:—

I give no opinion here as to whether the parties on one side or the other are unreasonable or foolish; many may consider them foolish in pushing their rights to an extremity. But all we have to do is to decide the questions brought before us on this appeal, which is from a judgment of Mr. Justice *Kekewich* granting an injunction and requiring the removal of a hoarding put up by the Defendant so as to obstruct the light coming through an arch under part of the line of the *London, Chatham, and Dover*

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(1) 41 Ch. D. 268.

(2) Law Rep. 9 Ch. 212.

(3) Law Rep. 1 Ch. 16.

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Railway. [His Lordship shortly stated the facts of the case to the effect above set forth and continued:—] The first question we have to consider is this: Is there any right at all in the Plaintiff, or rather is there, under the circumstances which I have stated, any obligation on the railway company not to obstruct the Plaintiff's lights? If a person who is the owner of two plots of land, on one of which a house has been built, sells the plot with the house on it and retains the other, then from the position in which he has placed himself towards the purchaser there is the implied obligation, or contract, or covenant (call it which you will) on his part not to interfere with the lights of the house which he has sold; and if this railway company was a mere ordinary owner of land, that would be the obligation which, unless rebutted, would *primâ facie* result from the position in which the vendor has placed himself towards the purchaser. Here the vendors were a railway company, and the difference, as it is argued—is this, that a railway company will not be presumed to do anything which would interfere with the construction of their railway. And no doubt that is so. Here it is clear upon the face of the conveyance, and I think it appears from the evidence, that there was a limitation on the implied contract entered into by the vendors (the railway company), viz.: that they were not to be restricted from doing what was necessary for the purposes of constructing their railway. That, in my opinion, is the true nature of the obligation here. But then it is argued that this really makes the obligation entirely dependent on the will of the railway company, and that that is quite inconsistent with and is repugnant to the grant of the house to the purchaser, through whom the Plaintiff claims. But that is not so. I think the true view is this, that the limitation of the obligation contracted by the railway company is not entirely dependent on the will of the railway company. It is that they may do anything which is required for the construction of their railway; and the engineer will determine, subject to the directors, what is necessary for the construction of the railway. That, therefore, is not a matter left entirely to the will of the company, but certain definite purposes are pointed out, for which alone the railway company are entitled to use the land retained so as to interfere with the

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obligation entered into by them as regards the light to the windows.

What I hold therefore is, that in this case the railway company as owners, not only of the lands sold, but of the land adjoining, entered into an implied obligation not to do anything on the adjoining land to interfere with the Plaintiff's reasonable enjoyment of the land sold except that which was necessarily required for the construction of the railway. So the first question we have to consider is whether this hoarding which is complained of by the Plaintiff was required for the construction of the railway. In my opinion it certainly was not. It is not that the railway company in making an alteration of their line have put up this hoarding, but the facts are that the company have granted to the Defendant a lease or interest under which he is in occupation, and for the purpose of making that occupation profitable to himself—and therefore possibly to some extent so as to give the railway company a larger rent for the archway—he has put up the hoarding which is complained of. That is either for his own pecuniary benefit or for the benefit of the railway company—I care not which—take it that it is for the pecuniary benefit of the railway company. But it is not for the purposes of the construction of their line, for which only are they entitled to deviate from or be relieved from their obligation as regards the house. That obligation is not to interfere with the light except in doing what is required for the construction of the railway.

It is said that in the case of such an implied covenant the Court will not interfere unless there is a substantial interference with the light of the Plaintiff. With that I agree. It was argued also on behalf of the Defendant that there could be no implied obligation in a case where, upon the evidence, the angle of light as it came to the house was less than of forty-five degrees. In my opinion that is entirely wrong. The Court will not interfere by injunction where it sees there is still a reasonable access of light of sufficient extent to the person complaining; but the obligation would be implied quite as much where there was no obstacle existing at the time opposite the house sold—no difficulty arising from anything there was on the land of the Plaintiff or the adjoining land. Take, for example, a house on *Salisbury Plain*, without anything to interfere with the light which came from the horizon. Could it be said that the vendor of such a house in retaining adjoining land did not subject himself to the implied obligation not to do anything thereon which would interfere with the access of the light to the house which he has sold ? It may be that, if he put up something which only diminished the light in an infinitesimal degree it would not be held to be such an interference as to call for the interference of the Court; but that does not affect the question whether or not an obligation was entered into by the vendor.

In dealing with the question whether or not there has been such a breach of the obligation as to justify or require the interference of the Court, it must be borne in mind that the position of the house and windows is such that a very small diminution of the light to the access of which the Plaintiff had a right would be prejudicial. The railway is close to the house, only eight feet off, and any interference with the light which came to it before the acts complained of would produce a serious effect.

The learned Judge had before him a variety of witnesses, who all say that since the act done by the Defendant there has been a substantial alteration in the light. One of them said (and this was very much commented upon in argument), that he saw the light "streaming down through this archway." I do not think one ought to criticise that expression very closely, but I understand this to mean that there was a substantial amount of light coming through this archway. Opposed to that is certain expert evidence. Without intending any disrespect to these witnesses, I agree with the learned Judge that evidence as to facts and experience is much more to be relied upon than any scientific evidence as to what will be the consequence of a certain act. And when I find here that the Judge, after seeing and hearing all the witnesses, relies upon the witnesses of experience in opposition to the expert witnesses, I cannot differ from the conclusion at which he has arrived.

Then there is one remaining point which was pressed upon us, that of acquiescence. But how has there been acquiescence? There has been no acquiescence in the thing complained of, because that has not been done until recently. There was, no doubt, a non-interference by the Plaintiff with the temporary obstruction of a small amount of light caused by some machinery put up by *Isaacs*. But to my mind there has been no acquiescence in the putting up of the hoarding by the Defendant. In my opinion this appeal fails, and, as the Counsel for the Respondents have properly waived the inquiry as to damages in respect of the buildings on the north-eastern side of the railway, the appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion.

As to the question of fact involved in the appeal, I shall really add nothing to what the Lord Justice has said, with this slight exception, that I do not consider that in a case of this sort we ought to review the decision of the Judge below, who has seen the witnesses, just as if we had seen the witnesses ourselves. We are not in that position. I am further impressed in the present instance by this, that the Judge below apparently founded his judgment mainly upon the evidence of one gentleman, Dr. *Tanner*, to which he seems to have attached much weight and importance, and if Dr. *Tanner* was a first-rate witness, and if his evidence was worthy of the attention and respect which the Judge gave to it, it is impossible to say that his evidence does not justify the finding that the light here has been substantially or appreciably diminished by the hoarding. I think, therefore, the matter being one peculiarly within the cognizance of the Judge, we cannot review his decision as to the fact, even if we differed from him. At the same time it must not be supposed that I differ from the learned Judge, and, so far as I can judge from the paper evidence that is before me, I do not say that I should not have come to the same conclusion.

But as to the point of law, which is perhaps of more general importance, I will add one or two words. Here is a railway company which is possessed of a large piece of land, along a portion of which the railway is intended to be constructed. The company allow a purchaser to enter on the residue of the land, close to the place where the line will in the end be carried, to occupy it under an agreement, and to build a house upon it, which house they finally convey to him.

Now what is the implied obligation that the company come under as regards the use of so much of the land as they retain for the purposes of their own railway? As in the case of all other implied covenants, or implied obligations, in order to see what the measure of the obligation is we must look at the reason of the thing, and at the surrounding circumstances, in order to ascertain, if we can, what was the obvious intention of the parties, so as to give to the transaction between them that minimum of efficacy and value, which, upon any view of the case, it must have been their common intention that it should have.

Supposing this were the case, not of a railway company, but of an ordinary landowner who has two pieces of land which either adjoin or are so near to one another that the enjoyment of the one, perhaps for all purposes, or at any rate for some purposes, depends upon the user to be made of the other portion of land. What is the obligation which the law assumes to arise between the parties as soon as the conveyance has been made, and comes into effect?

The owner of a piece of land which is not sold is selling a piece of adjoining land the full enjoyment of which depends upon the use which he makes of the portion which is not sold. Surely it must be in the contemplation of the parties that, in the absence of any express agreement one way or the other, the vendor shall not so use that land which he retains as to preclude any possible use of the building or land which he sells, or to prevent that use of it for which he knows he is selling it to the purchaser. It would be contrary to common notions of justice and fair dealing if it were otherwise; and the truth is that the law in such a case, when the parties have entered into the relation of vendor and purchaser, assumes from the circumstances an obligation on the part of the seller not to do anything with his own land which would defeat the known mutual intention of both parties upon the sale. Now apply that to a house. Suppose I have a large piece of land, on one part of which is standing a house; that house may be a mere congeries of bricks, never intended to be used as a house; but which may be pulled down and carted away so as to be sold as bricks. If I sell a house merely as

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bricks, of course the transaction would be different, but if I sell a house which is standing on part of my land as a house with windows in it, to be used as a house, and the windows in it to be used as windows, the least that the law implies from the necessary reason of the thing, is that I am not, upon the remainder of my land which I keep back, immediately I have sold the house and its windows, to do something which prevents all use of the house as a house, and all use of the windows as windows.

The law imposes that obvious duty in the form of what it calls an implied obligation, or implied covenant or contract, on the part of the vendor, who is selling one portion of his property and retaining the other, under circumstances like this, that he will not, on the property which he retains, use all his rights as owner with respect to the property which he retains, but will only use such of his rights of ownership as can be used consistently with the convenient and reasonable enjoyment of the house he has sold as a house. That is the ordinary implication. But, as is clear, this implication depends upon what one gathers from observing the transaction and trying to find in it a clue to the mutual intention of the parties, and as soon as you add facts which make it obvious that the intention of the parties was one way or the other, then you have facts which give a colour to the inference which the law draws, and which very often lessen the obligation which, in the absence of those facts, or that fact, would be supposed to have arisen. I keep a piece of land and sell the house as a house. The obvious intention, in the absence of anything else, is that I intend it to be used as a house. But if at the time I sell it I make it clear to the person who is taking the house,—or supposing the circumstances of the case make it clear to him,—that, although I sell it to him as a house, I am intending nevertheless to use the remainder of my land, which I keep, in a way which may interfere in some degree with the full enjoyment of the house as a house,—then you get a new fact or a new element introduced into the case, which shews that the intention of the parties was a limited one, and that it was not intended by the parties that the full use of the house as a house, or the full enjoyment of the lights and windows as windows, was the essence of the transaction.

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Now here it is said that, at the time that the railway company sold this house as a house, with its window lights to be used as lights, the purchaser had notice that the railway company intended to use the remainder of the land in a particular way which would necessarily interfere with the enjoyment of the light to the windows, and would, so to speak, modify the ordinary implication which the law would extract from the transaction.

Therefore it becomes necessary to look at what was the exact character of the conveyance, and at what the purchaser of the house was told at the time he made the purchase. It is clear that he was told that the railway company intended to construct a part of their line on a portion of the remainder.

I neglect, for the purpose of this judgment, any consideration of what the exact terms would be about anything else except this part of the land which immediately fronts the windows of the Plaintiff; but the purchaser was told, what it was most material for him with reference to his window lights to know, that the railway company, when they sold him the house and gave him the windows, required the remainder of the land for the construction of the railway.

Now to what extent did that modify the obligation which the law would infer? I think it would modify it to this extent: that the vendor would no longer be bound to leave the window lights intact, but he would have a right to diminish the light to the windows and to interfere with the enjoyment of the land so granted, so far as he required to do so for the purpose of constructing the line; but no further. And this would be the case unless you had some further fact or some further notice—something further to modify the intention of the parties to the transaction. Of course the broad rule applies, that the person who gives a thing to be enjoyed intends that it is to be enjoyed, and has no right afterwards to do anything which defeats the enjoyment to which he has consented, and which is the creature of his own gift.

The Appellant's argument therefore breaks down, because, although the purchaser clearly could not complain of the railway company interfering with his windows in the construction of their line, yet if the interference was one which went beyond

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the construction of the line, then the ordinary presumption of the law would apply. It seems to me that the erection of this hoarding is certainly not for the purpose of the construction of the line; but goes beyond it. Our decision rests on the broad ground that the vendor cannot derogate from his own grant, but is bound to allow the premises which he has sold to be enjoyed so far as they reasonably can be enjoyed, limiting the enjoyment only by the kind of user of his own land which he must be taken to have desired to preserve.

So much for the law of the case. The Appellant seems to me to fail, and the decision of the Court below must be affirmed.

As to the building on the other side of the arch, I agree with what the Lord Justice has said.

FRY, L.J., concurred.

Solicitors: *Saffery, Huntley, & Son*; *Hicklin, Washington, & Pasmore.*

W. W. K.

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STIRLING, J.
Aug. 2, 7;
Dec. 5, 6, 18.
1889
April 11.
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Nov. 9, 11, 13, 14, 15, 16, 18;
Dec. 21.

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[1877 R. 5.]

Common of Pasture—Inclosure by Lord of Manor—Sufficiency of Common.

In an action brought on behalf of all the tenants of a manor to restrain the lord from inclosing parts of the waste, and from digging or removing any part of the soil of the waste, so as to interfere with their rights of common, it was shewn that the tenants had rights of common of pasturage appendant over the waste for sheep, and that certain landowners not tenants of the manor had rights of common appurtenant over it for sheep, and that such rights appendant and appurtenant entitled the commoners to turn out a greater number of sheep than the waste would carry, but it was also shewn that having regard to the average number of sheep which had been turned out for many years it was highly improbable that nearly as many sheep as the waste could carry would ever be turned out upon it:—

Held, by the Court of Appeal, affirming the decision of *Stirling*, J., that the question whether there was a sufficiency of common must be determined, not according to the average number of sheep which the commoners had for a great number of years been in the habit of turning out, but according to the aggregate number of sheep which they were entitled to turn out. That there was therefore not a sufficiency of common, and that the lord ought to be restrained from doing any acts which would diminish the amount of pasturage.

Lake v. *Plaxton* (1) and *Lascelles* v. *Lord Onslow* (2) considered.

Whether, in ascertaining sufficiency of common, regard ought to be had to the present and modern system of sheep farming, according to which the sheep do not while turned out get all their sustenance from the common *quære.*

THIS was an action brought by Plaintiffs claiming respectively to be owners of freehold lands and copyhold lands held of the manor of *Banstead*, and of freehold lands formerly copyhold of the manor but now enfranchised, on behalf of themselves and all other owners and occupiers of such lands (except such of them as had released their rights of common) against Sir *John W. C. Hartopp*, the lord of the manor of *Banstead*, and his mortgagees who were in possession of part of the waste lands of the manor, and were added as Defendants by amendment. The object of the action was to establish the title of the Plaintiffs and of the persons on whose behalf they sued to certain common rights over the waste lands of the manor, and to obtain an injunction against certain acts which were alleged to be an infringement of those rights.

The statement of claim stated the waste lands to be *Banstead Downs*, 420A., *Park Down*, 74A., *Burgh Heath*, 87A., *Banstead Heath*, 757A., total 1338A. Paragraph 4 alleged that the freehold and copyhold tenants of the manor were entitled to the following rights over the common and waste lands of the manor, viz., "A right to pasture for all sorts of cattle and sheep levant and couchant upon their tenancy. A right of common of estovers to cut so much heath, gorse and bushes as may be required for fodder and litter for cattle levant and couchant upon their respective tenements, and for other purposes of agriculture and husbandry necessary for the beneficial and proper enjoyment and use of their said tenements, and for fuel to be used and burnt within and upon their said tenements. A right of common of turbary to cut and dig turves necessary for burning, and also a right to dig gravel, sand, and loam necessary for repairing and dressing the land within and upon their respective tenements." The statement of claim proceeded to allege that Sir *John Hartopp* had formed the design of inclosing the waste lands, and that after having negotiated with some of the principal tenants for a release of their rights he had proceeded to make four inclosures therein mentioned, and that he had also destroyed the pasturage on the waste lands in various places by stripping the surface of its green sward, and by digging out loam and other soil from the richer parts. By paragraph 13 it was alleged that the mortgagees since their entry into possession had destroyed and still continued to destroy the pasturage on the waste lands in various places by stripping the surface of its green sward and by digging out the loam and other soil from parts of the waste lands to the great injury of the commoners, and that they threatened and intended to continue to do so, and that unless restrained by injunction they would in course of time destroy all the available pasture on the waste lands. The Plaintiffs claimed a declaration that they and the other persons on whose behalf they sued were respectively entitled to the rights of common thereinbefore set forth over the commons and waste lands of the manor of *Banstead*—an injunction to restrain the Defendants from proceeding with certain cottages then in course of erection, and from erecting or causing to be erected any other houses or buildings, or any fences or inclosures upon the waste lands, and from destroying any herbage, furze, gorse, or ferns, or underwood on the waste lands, and from digging or removing any turves, loam, sand, gravel, or other material forming the soil of the waste lands "so as to interfere in any manner with any of the rights hereinbefore set forth, and claimed in this action." And there was a claim for damages.

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(1) 10 Ex. 196.

(2) 2 Q. B. D. 433.

The mortgagees by their defence admitted that the freehold and copyhold tenants of the manor, other than those whose rights of common had been released or otherwise extinguished, and other than tenants of new copyholds granted under a custom of the manor, were entitled to a right of common of pasture for sheep in and over the wastes, limited to two sheep for every acre of the respective tenements belonging to such tenants levant and couchant thereon. Save as aforesaid they denied the right of pasture for cattle and sheep. They further stated their belief that the Court rolls contained some evidence of the ancient right of the tenants of the manor to cut gorse and heath, and to cut and dig turves upon the wastes or some parts thereof for the purposes and subject to the limitations mentioned in the 4th paragraph of the statement of claim, and to dig gravel, sand, and loam upon the wastes or parts thereof for the support and repair of the buildings on their respective tenements, but not for dressing the land belonging thereto, and that the Court rolls contained other entries negativing such evidence. They went on to state that they did not know whether the rights claimed by the Plaintiffs on behalf of the freehold and copyhold tenants had been respectively, or when and by whom exercised, save that they (the mortgagees) were informed and believed that some of the freehold and copyhold tenants or their under tenants had cut heather and gorse for use as fodder and litter for cattle. They submitted to the Court whether the freehold and copyhold tenants other than as thereinafter mentioned were entitled to exercise the above rights, but they denied that tenants whose rights of common had been released or extinguished, or new copyhold tenants were entitled to exercise any of those rights. They stated their belief that Sir *J. Hartopp* had made the inclosures and erections complained of, but stated that they were not made with the knowledge of these Defendants, and that they believed they had caused no injury to the commoners. They admitted that on taking possession of the waste lands comprised in their securities they continued to cut turf and to dig loam and gravel from part of the waste lands, but not in larger quantities than had been cut and dug by the predecessors in title of Sir *John Hartopp* for many years last past, and by him before the commencement of the action; that such cutting and digging were lawfully done by Sir *J. Hartopp* and his predecessors in title, lords of the said manor, according to the custom thereof, and as owners of the soil of the wastes, and by these Defendants as grantees of Sir *J. Hartopp*. They admitted that in such cutting and digging they had necessarily destroyed a small part of the pasture growing on the waste lands, but they denied that they had done so to the injury of the commoners. They alleged that in cutting turf and digging loam and gravel they had only exercised their rights as legal owners of the soil of the wastes to do that which their predecessors in title had lawfully done for many years, and which they, these Defendants, were lawfully entitled to do, subject to the rights of the commoners, a great number of which had, however, been lately extinguished. They denied any intention to destroy the pasturage to the injury of the commoners, or that they would in time destroy all the available pasturage on the waste lands, and they alleged that more than a sufficient quantity of the pasturage upon, and other products of the wastes had always been, and still was, left for the use of the remaining persons entitled to rights of common. And the Defendants stated that they were informed and believed that none of the Plaintiffs had in fact exercised any rights of pasture upon the waste lands.

In July, 1886, the action came on for trial; Sir *John Hartopp* did not appear. The Plaintiffs, in support of the case that sufficient common was not left, adduced evidence to shew that the owners of certain farms known as *North Tadworth Farm*, *Canon's Farm*, and *Reed's Rest Farm*, of which farms Lord *Egmont* was the present owner, were entitled to rights of common. The Defendants alleged that these farms were not held of the manor and that they were taken by surprise. Ultimately, on the 7th of August, 1886, an order was made granting an injunction to restrain Sir *John Hartopp* from further inclosing or building and giving liberty to apply for a mandatory injunction as to the existing inclosures and buildings, and directing that as between the Plaintiffs and the mortgagees the following questions should be referred to Mr. *Meadows White*, Q.C.

(1.) Who are the classes of persons and persons entitled, and in respect of what lands, to any and what rights of common of pasture and estovers and other commonable rights upon and over the said waste lands of the said manor of *Banstead*.

(2.) Whether notwithstanding the said inclosures made by the Defendant Sir *J. W. C. Hartopp*, there is still sufficiency of common on the said waste lands for the persons entitled to exercise the said rights.

And the Plaintiffs by their counsel, assenting for the purpose only of the said inquiry as to sufficiency, and without prejudice to the Plaintiffs' rights, that the right of common as to sheep over the waste lands was limited to two sheep for every acre of the tenement in respect of which such right was exerciseable, the referee by consent was to adopt the measure of two sheep per acre in making his report as to sufficiency. Further proceedings against Sir *John Hartopp* were stayed, and further consideration was adjourned.

The referee by his report found that the freehold, customary freehold and copyhold, tenants of the manor were entitled to the following rights of common over the waste lands of the manor, which he found to amount to 1299 acres: "A right of common of pasture for all sorts of commonable cattle levant and couchant upon the tenements of the freehold and copyhold tenants of the manor and appendant or appurtenant thereto, and the right of common for sheep which I have assumed for the purposes of this case to be limited as above mentioned. A right of common of estovers to cut so much heath, gorse, fern and brake as may be required for fodder and litter for cattle and sheep levant and couchant upon the respective tenements of the freehold and copyhold tenants of the manor, and for other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of the said tenements, and for fuel to be used and burned within and upon the said tenements. A right of common of turbary to cut and dig turves necessary for burning within, and also a right to dig loam necessary for repairing the ancient tenements held of the manor. The occupiers of such ancient tenements within the manor have also a right to cut and take fern, brake and furze to be used for fuel and otherwise within and upon such ancient tenements." He then stated who were entitled to rights of common, and in respect of what lands, including the trustees of the Earl of *Egmont* in respect of a part of *Warren Farm* called *Little Burgh*, part of *Canon's* and *Reed's Rest Farms*, and *North Tadworth Farm*. He also found the owner of *South Tadworth* manor entitled to common for 200 sheep, and he came to the conclusion that upon the assumption of two sheep being allowed for each acre of the lands the right of common was exerciseable in respect of 2356 sheep. He then reported that notwithstanding the inclosures that had been made here was sufficiency of common of estovers and turbary, "but that there is not sufficiency of common of pasture on the said waste lands for the persons entitled to exercise the said rights of common of pasture as above mentioned." He reported that the freehold and copyhold tenants of the manor were entitled to common appendant for 640 sheep. He found that lands outside the manor were entitled to common as follows: *South Tadsworth* for 200 sheep, *North Tadworth* for 876, and *Canon's* and *Reed's Rest Farms* for 640, total 1716. The referee went on to say: "The Defendants admitted the right of common of pasture over the said waste lands in respect of lands of an acreage of 272A. 1R. 28P., which at the limit aforesaid would give a right of pasture for 543 sheep. I find that there would be sufficient common for such a number of sheep if the sheep were turned out and the commons used according to the modern and present practice of sheep farming, rearing, and management, for I find that the said common would carry 1200 sheep if used according to such practice. But I find that there would not be sufficient common of pasture for such a number of sheep as 543, if during the usual months of the year for turning out, and in average seasons, the sheep were turned out to get all their sustenance from the common. Such a number of sheep would require all that the common would yield by way of sustenance, and more. I further report that, judging from what has been proved before me as to the past user of the common for (say) the last twenty years, I find that although the right of turning out sheep in respect of the above-mentioned tenements taken at the measure of two sheep to the acre would amount in the aggregate to a right of turning out 2356 sheep, yet by reason of the probability that the number of sheep actually from time to time kept on the farms would not amount to the full number of two sheep to the acre, and that in some case the farmers would not keep sheep at all, or exercise their rights at all even if they kept sheep, and also by reason of the modern practice of using commons above mentioned, it is not probable that the commons would in point of fact be used by or required for the use of more than 1200 sheep at any one time."

A motion was made to vary this report, and Mr. Justice *Stirling* found *North Tadworth* and *Canon's* and *Reed's Rest Farms* entitled collectively to common for 600 sheep only, instead of

1516, thus reducing the total of 2356 found by the referee to 1440.

The cause came on upon further consideration on the 2nd of August, 1888.

Sir *R. E. Webster*, A.G., and *McClymont*, for the Plaintiffs :—

The result of both inquiries has been substantially in favour of the Plaintiffs, for on the first inquiry it has been proved that rights of common exist in respect of a larger number of sheep than the Defendants have hitherto admitted; and on the second it has been established that there is not a sufficiency of pasture for all the persons entitled to rights of common over the waste.

If it be said that no damage has been found, the answer is that the maintenance of inclosures which exclude us from part of the common and cause or increase insufficiency is an injury entitling us to remove them, or to have an order for that purpose; but whilst we desire to have a declaration of our rights, we do not press for an immediate removal. As to the cutting of turves, the acts of the Defendants in that respect are inconsistent with our rights and the cause of injury and damage, as they are doing sensible harm to the common.

Sir *Horace Davey*, Q.C., *Jeune*, Q.C., and *Stuart Moore*, for the Defendants :—

The Plaintiffs have got their decree as against Sir *John Hartopp*, the lord of the manor, against whom this suit was originally instituted in 1877, and they are not entitled to any relief as against the present Defendants, who were only brought into the suit in 1884 as trustees who are mortgagees of *Banstead Common* and *Banstead Heath*. These Defendants have never disputed the right of pasture for sheep, the only important right in question. The inclosures complained of were made before they entered into possession of the wastes, and there is no allegation that they have made any further inclosure, or even threatened or intended to do so. They took the earliest opportunity of separating themselves from Sir *John Hartopp's Case*, and an injunction against them would under the circumstances be unprecedented.

As to their having pared turves, they have done so pursuant to the proprietary rights vested in them as owners of the soil. These rights they are fully entitled to exercise, subject to, and so long as they do not obstruct or interfere with the rights of the commoners; and there is here no evidence that any one has suffered any injury or been prevented from exercising any commonable right by any act of the Defendants. The paring is a temporary removal of a small portion of the turf, and not (like an inclosure) a permanent alienation of the common. The whole area pared only comes to about five acres, and the evidence shews that the turf recovers in from three to five years, and sometimes at a shorter period. The action was continued against the Defendants simply upon the question of paring.

[Sir *R. Webster*, A.G.:—We stated on a former occasion that we wanted an injunction as evidence of our title, and as one not to be enforced without the leave of the Court.]

That was as against Sir *John Hartopp*. As against these Defendants this long inquiry has been unnecessary, and no injunction is wanted or can be granted, for there has been no interference by them with any right.

The right of turbary claimed was for a right as appendant to all the freehold and copyhold tenements of the manor, while all that the referee has found is a right of turbary for ancient tenements, and none of the Plaintiffs have proved the holding of an ancient tenement, nor is there, in fact, any evidence that there is a single ancient tenement within the manor.

Upon the question of sufficiency, if it be an issue material to the case seeing that the right to throw out the inclosures is not insisted on, we submit that we are entitled to judgment. There never was a time when there was not a practical sufficiency, and there is evidence that if more sheep had been turned out the pasture would have been improved. We rely on *Lascelles* v. *Lord Onslow* (1), which is an authority that the average demand in the past is a fair measure of the requirements of the commoners in the future; and in this case, like that, the principle is that sufficiency is a practical question of what are practical requirements. *Robinson* v. *Duleep Singh* (1) is an authority to the same effect. If every one always exercised his rights to their fullest theoretical extent, there would not be anything left for the lord. No relief ought to be given against us, and at all events we ought not to be called upon to pay any costs.

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(1) 2 Q. B. D. 433.

Sir *R. E. Webster*, A.G., in reply, referred to *Lascelles* v. *Lord Onslow* (2), and *Carr* v. *Lambert* (3).

1889. April 11. STIRLING, J. (after stating the nature of the action, and the pleadings and procedure down to the report of the learned referee), continued:—

A motion was made on behalf of the Defendants to vary this report, and upon this coming on I asked the learned referee to give me explanations as to certain of his findings; and from these it appeared that the referee was of opinion that *North Tadworth Farm* and a large portion of *Canon's* and *Reed's Rest Farms* were not proved to have been held of the manor of *Banstead*. As the result of the motion to vary, I have come to the conclusion that the owner and occupier of *North Tadworth Farm* was entitled to common of pasture for 300 sheep on parts of the common called *Burgh Heath* and *Banstead Heath;* and I have adopted the report of the referee as regards *Canon's* and *Reed's Rest Farms* to this extent, that the owners and occupiers of these farms are entitled to common of pasture for 300 sheep.

In the result, therefore, it appears to me to be established that there exist rights of common of pasture over the wastes of the manor for upwards of 1400 sheep. The referee says that there would not be sufficient common of pasture for so many as 543 if turned out during the usual months, and in average seasons, to get all their sustenance from the common. And he further says that even if the commons were used in accordance with the modern and present practice of sheep farming, rearing, and management, there would be an insufficiency, for in such a case he finds that the common would carry 1200 sheep only. At the

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(1) 11 Ch. D. 798, 830.

(2) 2 Q. B. D. 449.

(3) Law Rep. 1 Ex. 168, 176.

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same time the referee finds that for several reasons it was "not probable that the commons would in point of fact be required for the use of more than 1200 sheep." This conclusion is arrived at on the basis that the total number of sheep in respect of which rights of common exist is 2356; if the number be only 1430, it may be taken as probable that the commons would not in point of fact be used or required for the use of so many as 1200 sheep.

Under these circumstances, it seems to me that on both inquiries the Plaintiffs have been substantially successful. As regards the first, the rights of common have been proved to exist in respect of a larger number of sheep than the Defendants were prepared to admit either before the referee or myself. As regards the second inquiry, the findings appear to me to establish that a sufficient quantity of pasturage for all the persons entitled to rights of common over the wastes does not exist.

In coming to this conclusion I do not think I am departing from anything laid down in the case of *Lascelles* v. *Lord Onslow* (1), which was much relied on by the Defendants. What that case was decided on was a special case stated by an arbitrator, and the findings on it were very different from those of the learned referee in this case, with whose decision I am dealing. In the first place, in *Lascelles* v. *Lord Onslow* there was no finding as to the persons actually entitled to exercise the rights of common over the waste there in question. The statement with regard to the persons entitled to exercise those rights of common appears in paragraph 7 of the special case set out at page 434 of the report. [His Lordship then read that statement, and also the statement in paragraph 31, set out at page 441, and continued:—]

That is dealt with in the judgment as follows (2): "The case finds explicitly that, notwithstanding the leases and the acts done under them by the Defendants and their predecessors, there has always been a sufficiency of turf left. It also finds that the acts done were not such as to cause any insufficiency of estovers. As to these, therefore, no actual injury has been sustained, and the only question is whether any legal injury—any injury to the right—has been committed. But as regards the right of common of

(1) 2 Q. B. D. 433.

(2) 2 Q. B. D. 449.

pasture, the finding is not so explicit." Then the learned Judge, after reading the 31st paragraph of the special case, proceeds: "This statement seems to imply that if the tenants had continued to turn out as many cattle as they formerly did, there would not now in ordinary seasons be sufficient pasture left. But it does not say so in terms, nor would it have been conclusive if that had been found as a fact. The rights of the lord, as owner of the soil, are subordinate only to the rights of the commoners. Changes in the modes of managing farms, in the description of cattle kept, and the kind of food given, and in the produce raised, the appropriation of the land to other uses, its conversion into nurseries, hop gardens, market gardens, or building ground, or other changes, may permanently diminish the demand of the commoners on the pasture of the common. The right to turn out is measured by the capacity of the commonable tenement to maintain; it is to turn out so many commonable beasts as the winter eatage of the tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining: *Whitelock* v. *Hutchinson* (1); *Scholes* v. *Hargreaves* (2). There never has been an insufficiency; and in ordinary seasons there will not be, if the average demand for the last ten years is to be taken as a fair measure of the requirements of the commoners for the future. And we cannot see why it should not be. In the absence of any evidence tending to an opposite conclusion, we see no reason for supposing that the requirements of the commoners for the future will be greater than they have been for the last ten years. On the contrary, looking at the situation of *Chobham*, and the advance of population on all sides, we think that the capacity of the commonable tenements as a whole to maintain commonable cattle is more likely to be a decreasing than an increasing quantity. We, therefore, come to the conclusion that a sufficiency of pasturage has been left, and that the plaintiffs have failed to make out any cause of complaint on this head of claim. We do not lose sight of the rule which casts the *onus probandi* in such a case on the lord; but the facts found and the considerations to which we have adverted, raise a presumption so strong as to call on the plaintiffs to rebut it."

(1) 2 Mood. & Rob. 205.

(2) 5 T. R. 46, 48.

The Court, therefore, in that case, came to the conclusion, in the absence of any rebutting evidence on the part of the plaintiffs, that a sufficiency of common had been left. Here, however, it is found that rights of common in respect of 1430 sheep actually exist, and that even when used in accordance with the modern practice, the commons are now incapable of carrying more than 1200 sheep; and although under present circumstances it may be more or less probable that the commons will not be required to carry so many, still it appears to me to be perfectly possible that changes in farming practice which may hereafter occur will lead to the commoners insisting on their full rights, and I cannot come to the conclusion that I ought to treat those rights as being to any extent practically gone for ever.

Notwithstanding these findings no actual present damage is shewn to have been suffered by any person entitled to rights of common over the waste; and it was contended on behalf of the Defendants either that no relief ought to be given to the Plaintiffs in the action, or at all events that they ought not to be called upon to pay any costs.

Now relief is sought by the statement of claim against the Defendants, the mortgagees, in respect of two matters: (1) the maintenance of inclosures actually made by Sir *John Hartopp*; and (2) the cutting of turf and digging of gravel [loam ?] by the Defendants themselves. As regards the first, it is said by the Defendants that they do not by their defence claim the right of inclosing the common, and that at the trial they did not oppose an order removing the existing inclosures, and that in any event these inclosures are not shewn to actually injure the commoners and ought not to be ordered to be removed.

Now, although no actual damage to any commoner is proved, I think that, as sufficiency of common is not established, the maintenance of any inclosures which would permanently exclude the commoners from a portion of the common is such an injury to the legal rights of the commoners as entitles them to an order for the removal of these inclosures if they insist upon it. The case of *Arlett* v. *Ellis* (1) appears to me to shew that the commoners are entitled themselves to remove, and *a fortiori* to have

(1) 7 B. & C. 346.

an order for the removal of those inclosures, so as to restore to themselves those rights of common which would be injured by their continuance. The Plaintiffs, however, I understand, do not press for an immediate order for removal, but are willing that the inclosures should continue at all events for the present. It seems to me that as regards this part of the case, justice may be done if an order is made in this form:—Declare that the Defendants are not entitled to continue the existing inclosures of the pieces of land in the statement of claim mentioned; and the Plaintiffs not pressing for an order for the immediate removal thereof, let them be at liberty to apply for an injunction to restrain the Defendants from permitting or suffering the said pieces of land to be or remain inclosed or built upon.

I now proceed to consider the rights and remedies (if any) of the Plaintiffs in respect of the cutting of turf; but before dealing with this it is necessary to state a few of the facts relating to this portion of the case. The quantities of turf cut by the Defendants prior to their being made parties to the action were thus stated by the leading counsel who represented them before the referee. From the 1st of January to the 31st of December, 1881, the number of turves cut was 32,605, covering an area of over 3 acres; in 1882 it was 52,750; in 1883 it was 43,000 odd; in 1884 it was 60,000 odd. In February, 1885, the Defendants were made parties, and in that year only 7625 turves were cut. It thus appears that prior to the Defendants being made parties to the action they removed turf to the extent of at least between two and three acres per annum. As regards the time required by the places from which turf had been removed to recover themselves, the evidence was somewhat conflicting; but the fair result of the passages to which my attention was called by counsel (and I assume that these included everything in the depositions which is material) appears to me to be that the time required varies in different parts of the common from two to six years, and possibly to a still greater number of years in places where the soil was poor.

I have then to determine whether the acts of the Defendants in removing turf to this extent constitute an injury to the Plaintiffs, bearing in mind on the one hand the findings as to sufficiency of common, and on the other, the fact that no actual damage to any commoner is proved. The law as to the position of the lord has been stated by Vice-Chancellor *Hall* in a passage in his judgment in *Hall* v. *Byron* (1) which was accepted by Lord Justice *Fry* as correct in *Robinson* v. *Duleep Singh* (2). It is this: "The law I consider to be that the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoners' rights, his right so to do being quite independent of the right of approvement under the *Statute of Merton* or at Common Law, and existing by reason of his ownership of the soil, subject only to the interests of the commoners. *Bayley*, J., in *Arlett* v. *Ellis* (3), said: 'The lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes.'" To that I will add one further sentence from the judgment of Mr. Justice *Bayley*, which is this: "He" (that is the lord) "may also exercise his right by turning in rabbits, provided he leave a sufficiency of common for the commoners."

The question then is, Were the acts of the Defendants under these circumstances, which I have mentioned, consistent with the rights of the commoners? And for the purpose of answering this question, it appears to me desirable to refer to one or two of the older cases, in order that it may be ascertained precisely what the legal rights of commoners are. In *Robert Marys' Case* (4), Lord *Coke* twice states what is necessary in order that an action by a commoner may lie against a stranger in respect of an invasion of his rights of common. The two statements together do not precisely coincide, and gave rise subsequently to some differences of opinion. The first is this (p. 113 a): "For every feeding by the cattle of a stranger, the commoner shall not have an assize nor an action on the case, as his case is, but the feeding ought to be such *per quod* the commoner, &c., common of pasture, &c., for his cattle, &c., *habere non potuit, sed proficuum suum inde per totum id tempus amisit, &c.* So that if the trespass be so small, that he has not any loss, but sufficient in ample manner remains for him, the commoner shall not take them damage-feasant, nor have any action for it; but the tenant of the land may in such case have an action." Then a little further on he says: "So in the case at bar, the lord of the soil shall have an action for trespass done in the waste or common, as an immediate trespass to him, be it greater or less, but the commoner shall not have an action but by consequence, namely, if the trespass be such, *per quod proficuum communiæ suæ, etc., amisit*, or that he could not have his common in so beneficial a manner as he had before."

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(1) 4 Ch. D. 667, 675.
(2) 11 Ch. D. 798.
(3) 7 B. & C. 369.
(4) 9 Rep. 111 b.

The question as to the true rule arose and was decided in *Wells* v. *Watling* (1). That was an action against a stranger, and the plaintiff declared possession of the lands for which he was entitled to common of pasture, and the defendant "on the 1st of January, 1777, and afterwards, wrongfully turned 3000 sheep thereon, whereby the plaintiff could not enjoy the benefit of his common in so ample a manner" as he could before. Certain facts were proved at the trial, but no evidence was given whether in the particular year 1777 the plaintiff turned on any sheep; and it was contended that the plaintiff could "not maintain this action for an injury, because he had suffered no damage; as it did not appear that he turned any sheep on the common that year." The Lord Chief Justice said, "The defendant has mistaken the ground of his objection. It is material for the plaintiff, and he must shew that he could not exercise his right *tam amplo modo, &c.* This has been both laid in the declaration, and also proved by consequence; for every unlawful surcharge is *pro tanto* a diminution of the right and profit of every other commoner. It is certainly necessary that the plaintiff receive some actual injury, in order to maintain this action; but it is laid down in *Marys' Case* (2) that the plaintiff must shew the injury to be such *quod non potuit habere, &c.* The question is merely upon the nature of the defendant's act in the greatness or smallness of it, not on the plaintiff's exercise of his right. It is sufficient if the right be injured, whether it be exercised or not." Then Mr. Justice *Gould* says: "I always thought the doctrine of Lord *Coke* in *Marys' Case* (1), that there must be a loss of the common in order to maintain this action, a singular doctrine of his own, and not any part of the judgment of the Court. The injury consists in preventing the enjoyment of the common *tam amplo modo*. It appears from 2 *Brownlow,* 140, that an action lies for this damage, let it be ever so minute." Mr. Justice *Blackstone* then says: "I always have understood that an action on the case lay by one commoner against another for a great and exorbitant surcharge, which is proved to be the present case. It amounts to a kind of disseisin, and probably was so in the present case; for when the defendant had so grossly surcharged, the profit of the common was gone, and it was in vain for the plaintiff to turn afterwards. Any act that will ground a *per quod,* and lessen the profit of the common will support an action against the commoner. Any act that totally destroys the herbage, as feeding a common with rabbits, will support an action against the lord. Nor do I see anything singular, or repugnant to this, in the doctrine of *Marys' Case.* The commoner, says the book, must shew that '*proficuum communiæ suæ per totum id tempus amisit,*' or 'that he could not have his common in so beneficial a manner as before.' It is not necessary he should have lost his common, but only the *profits* of his common; that is, that he *could not* take them so well as before."

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(1) 2 W. Bl. 1233.

(2) 9 Rep. 111 b.

This doctrine so laid down was followed in *Hobson* v. *Todd* (2), and was referred to in *Pindar* v. *Wadsworth* (3). These cases appear to me to shew that any act of a stranger whereby the commoner is prevented from having the use and enjoyment of his common of pasture in as ample and beneficial a manner as he otherwise would, is a legal injury for which an action will lie, even although no actual damage may be proved.

Such being the law as between the commoner and the stranger, how does it stand as between the commoner and the lord? In considering this I first of all refer to a passage in the judgment of Vice-Chancellor *Hall* in the case of *Hall* v. *Byron* (4). He

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(1) 9 Rep. 111 b.

(2) 4 T. R. 71.

(3) 2 East, 154.

(4) 4 Ch. D. 680.

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says this: "The defendant does not by his answer claim to be entitled to dig and cut loam and turf, not leaving sufficient of the wastes for the commoners, which if it had been claimed would have required me (had there been evidence establishing that the defendant had exercised such alleged right) to say whether or not *Bateson* v. *Green* (1) is or is not to be followed. I should add that I do not think there is ground for the suggested distinction that the lord cannot dig or cut for the purposes of sale. In reference to this question of right, I consider the *onus probandi* is on the tenant, and not, as in the case of approvement, on the lord. The *onus probandi* being on the lord in the case of approvement would seem to arise from this, that the lord having made a grant over the whole waste, his right to inclose is treated as a right conditional upon his establishing that there is sufficient waste left for the tenant to enjoy the right of common granted, whereas as regards the lord's getting marl, that is, by virtue of his ownership of the soil, subject only to the tenants complaining, if they can establish their complaint, of his unduly availing himself of his ownership of the soil, just as the tenants may complain that the lord turns too many beasts on to the common, in which case the *onus probandi* would be on them." Beyond that I derive no assistance either from *Hall* v. *Byron* (2) or *Robinson* v. *Duleep Singh* (3), for in both cases the Court arrived at the conclusion that the plaintiff had failed to establish insufficiency of common.

In *Coney's Case* (4), the question was whether a commoner was entitled to kill coneys which the lord had turned on the waste. Lord Chief Justice *Gawdy* says (p. 124): "He cannot kill the coneys because he may have other remedies." Mr. Justice *Shute* says: "A commoner cannot take or distrain the cattel of a freeholder damage feasants; and therefore he cannot kill or destroy the coneys, and he hath a remedy; for he may have an action upon the case, or an assize against him for putting in of the coneys, if he do not leave sufficient common for the commoner." This, it will be noticed, agrees with the sentence I have quoted from the judgment of Mr. Justice *Bayley* in *Arlett* v. *Ellis* (5).

(1) 5 T. R. 411.
(2) 4 Ch. D. 667.
(3) 11 Ch. D. 798.
(4) Godbolt, 122; 2 Leon. 201.
(5) 7 B. & C. 369.

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Atkinson v. *Teasdale* (1) related to the rights of one commoner against another, but the rights of the commoner against the lord were discussed both in the argument and in the judgment. I will read a few passages from the judgment. The Lord Chief Justice *De Grey* says (2): "The *lord* may *approve* against a tenant that hath common of pasture, as often as he pleases, so that he leave sufficient *common*, but if he doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the inclosure, because it standeth upon the ground which is his common. If the owner of the soil ploweth up the land, the commoner shall have an action upon the case in the nature of a *quod permittat*; a commoner may have an action upon the case or an *assize* against the owner of the land, for putting on more cattle than he ought to put on, and thereby not leaving sufficient common for the cattle of the commoner." Then he explains the nature of the *quod permittat*, and refers to one or two other cases. Then he says (p. 290): "From this case it seems, that in an action against the *lord*, it is necessary to shew a particular *surcharge*; and in *Lutwych* 107, it was so held *per curiam*, but that was not the point there in judgment, so it is not a *judicial* determination." Then he says: "It seems clear that when an action on the case is brought against *the owner of the soil*, for obstructing a *commoner* in the enjoyment of his common, the particular injury done must be shewn in the declaration. If the *lord surcharge* the common, a *commoner* cannot *chase* the lord's beast out of the common; but the beasts of a *stranger*, the *commoner* may distrain *damage feasant*, or may *chase* them out of the common, for a *stranger* has no colour to have his cattle there; a *commoner* cannot kill coneys upon the common; but, if the *lord surcharge* the soil with coneys, the *commoner*, upon this particular loss, may have an *action upon the case*; which is a sufficient remedy against the *lord*."

In the notes to *Mellor* v. *Spateman* (3) the law is thus stated: "If the defendant be *lord of the manor*, or put his cattle upon the common *with the lord's license*, the commoner cannot maintain an action unless he has sustained a *specific injury*. It is not enough

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(1) 2 W. Bl. 817; but more fully in 3 Wils. 278.

(2) 3 Wils. 289.

(3) 1 Wm. Saund. 346 b.

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to shew that the cattle consumed the grass, as in the case of a *stranger*, but it must appear that there was not a *sufficiency* of common left, in order to support the action." These authorities seem to me to shew that acts which, if done by a stranger, could support an action at law by the commoners against him, will also support an action against the lord, provided the commoner can shew that sufficiency of common is not left for him.

Here the Plaintiffs prove that if all the persons entitled to common of pasture exercised their rights to the full, there would not be sufficiency of common. They also prove acts by the Defendants which would deprive the commoners of the benefit of a substantial portion of the common for periods varying from two to six years. In my judgment those acts constitute an injury to the legal rights of the Plaintiffs, and I think that in respect of them the Plaintiffs could maintain an action at law, and recover nominal damages.

Whether the Plaintiffs are entitled to an injunction appears to me much less clear. The acts of the Defendants do not permanently deprive the commoners of their rights; there is no immediate probability of the commoners exercising their rights to the full; and even if they did, any loss which they might incur might, so far as I can see, be adequately compensated for by damages. Under these circumstances I should, as at present advised, feel great difficulty in granting an injunction. The Plaintiffs, however, do not ask me to do so; they are content with a declaration of their rights; and it is unnecessary that I should go through the form of awarding them nominal damages. I propose, therefore, as regards this part of the case, to declare that the cutting by the Defendants of the pasture, herbage, or turf growing in or upon the waste lands of the manor constitute an injury to the rights of common of the Plaintiffs, and the other persons on whose behalf they sue, over the waste lands.

I have now to deal with the question of costs. The Plaintiffs, as I hold, are entitled to some relief in respect of the inclosures.

Ought I to deprive them of costs because the Defendants do not by their defence claim the right to inclose, and because their counsel at the trial said that he did not object to an order for the removal of the existing inclosures? In the first place, it is to be observed that the Defendants do not by their defence offer to submit to an order for removal; on the contrary, they say that they believe that the inclosures do no harm to the commoners. And although at the trial the Defendants' counsel said that he did not object to an order for the removal of these inclosures, yet I think that the Defendants carefully avoid making any such admission as to the sufficiency of the commons as would have entitled the Plaintiffs to an order as of right for their removal. Before the referee the Defendants strenuously resisted findings on the inquiries which would go to establish the Plaintiffs' case as to insufficiency of common; and in fact one learned counsel who represented them asked that the question of sufficiency should be dealt with in such a way as to enable the Defendants to ascertain whether they could inclose or not. [His Lordship then read a passage from the shorthand writer's notes of the proceedings before the referee to that effect, and continued:—]

In my opinion the Defendants, though not caring (doubtless for good reason) to insist on a right to maintain the existing inclosures, nevertheless were very desirous to avoid an adverse decision as to the sufficiency of common.

Under these circumstances, I should have thought that even if the Plaintiffs had entirely failed, as regards the cutting of turf, they ought nevertheless to have a very considerable portion of the costs of the action; but as I have come to a conclusion in their favour, I am of opinion that the general costs of the action ought to follow the event. The costs will, therefore, fall on the Defendants; but as regards the motion to vary the referee's report, each party will bear his own.

W. W. K.

The judgment was to the following effect:—

"This Court doth hereby adopt the referee's said reports, dated the 15th of March, 1888, and the 9th of July, 1888, with the following variation (that is to say), that the right of pasture in respect of *Canon's* and *Reed's* farms is for 300 sheep and in respect of *North Tadworth Farm* for 300 sheep on those parts of the waste lands of the manor of *Banstead*, in the pleadings mentioned called '*Burgh Heath*' and '*Banstead Heath*.' Declare that the Defendants are not entitled to continue the existing inclosures in the statement of claim mentioned.

The Plaintiffs not pressing for an order for the immediate removal of the inclosures, liberty to apply for an injunction against suffering the inclosures on *Banstead Heath* and *Banstead Downs* to remain. Declare that the cutting and digging by the Defendants of the pasture, herbage, turf, or loam in or upon the waste lands of the manor called *Banstead Heath* and *Banstead Downs* constitute an injury to the rights of common of the Plaintiffs and of the other persons on whose behalf they sue, over the said waste lands."

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The mortgagees appealed from this judgment, and the Plaintiffs gave cross notice of appeal to vary the decision as to the number of sheep to be allowed to *North Tadworth* by restoring the finding of the referee.

The appeals came on for hearing on the 9th of November, 1889.

Sir *Horace Davey,* Q.C., *Jeune,* Q.C., and *Stuart Moore,* for the Appellants :—

The principal question of law which arises is what is meant by "sufficiency of common"; is it a practical and actual, or a theoretical, sufficiency; is or is not the Court to assume that all persons having rights of common will exercise their rights to the full extent at the same time? We contend that practical sufficiency is that which ought to be regarded. In this case it has been decided that rights of common exist for 1440 sheep; but as a matter of fact there never have been anything like 1440 sheep upon the common, and none of those who are entitled to rights of common have exercised them for some years. If every one put on the full number of sheep and took full sustenance all the year round night and day, no doubt the common would be insufficient; but, in that sense of the term, it never was sufficient, and it is amply sufficient for the average number of sheep turned out upon it.

The chief ground of complaint is in respect of the paring of the turf by the Defendants. Not one of the Plaintiffs has ever turned out a single sheep, or suffered any damage by the paring of the turf. This is not a case of approvement under the *Statute of Merton,* but of the owner of the soil exercising the ordinary rights of an owner, and the Plaintiffs, in order to maintain an action against such owner for injury to their rights, must shew actual, not mere theoretical or notional, damage.

In the opening of this case nothing was alleged as to prescriptive rights of common, but only as to rights of freeholders and copyholders. Afterwards the Defendants were asked to embark on a contest as to whether Lord *Egmont* or his trustees had prescriptive rights of common. We submit that the evidence is insufficient to establish the existence of any such prescriptive rights. It may be said that this would not be *res judicata*, as Lord *Egmont* is not a party; but it would be very difficult to induce a jury in another action to differ from the finding of the referee and the judgment of Mr. Justice *Stirling* in the present action. There has been no actual user of the alleged prescriptive rights for many years, and upon a question of sufficiency the Plaintiffs are not entitled to bring into consideration prescriptive rights which for a length of time have not been actually used. Their contention is that if we pare a single turf we shall not leave sufficiency of common, not for them, but for entire outsiders who have shewn no intention of exercising any rights over the common. It is unreasonable for them to say, "We will prevent you from cutting turf, not because you will thereby not leave enough common for us, but because you will not leave enough for Lord *Egmont's* trustees who for sixteen years have not exercised any right over the common." We say that the early documents shew *North Tadworth* to have no such right as is alleged. The predecessors in title of the Plaintiffs denied the existence of such rights, and this is evidence against the Plaintiffs: *Kitchin* on Courts Leet (1). The common can support all the sheep that ever will be turned out upon it, especially as according to the modern system of sheep farming, in which the sheep only get a small part of their food from the common, it will suffice for many more sheep than under the old system.

There is no allegation that the Defendants intend to make any further inclosures, nor do the Defendants insist on any right to make them, so there is nothing at issue but the right of getting turf, loam, and gravel. We contend that where commoners sue the lord they must prove special damage, though it is otherwise if they are proceeding against a stranger. Mr. Justice *Stirling* says that here if the commoners exercised their rights to the full there would not be sufficient common for them. We say that is not the test, but that the tenants must shew their rights of common to have been practically interfered with. What is meant by sufficiency of common? We say that there is sufficient common so long as no commoner is interfered with in exercising his right. *Lake* v. *Plaxton* (1), and *Lascelles* v. *Lord Onslow* (2) shew that the average use of the common is to be taken into account. A commoner cannot sue the lord unless he has sustained a specific injury: *Mellor* v. *Spateman* (3). He cannot even sue a stranger if the injury be inappreciable: *Robert Marys' Case* (4). As regards digging in the waste the burden of proof is on the commoner to shew that his rights have been interfered with: *Hall* v. *Byron* (5); *Robinson* v. *Duleep Singh* (6). The alleged right of Lord *Egmont* to common appurtenant which he does not come forward to claim is not to be taken into account: *Lake* v. *Plaxton*. It is a right neither claimed nor exercised. It is on the Plaintiffs to shew that the acts of the Defendants are prejudicial to them, and this cannot be supported by vague evidence of a third person being supposed to have a right which he may be able to substantiate, there being all along abundant common for every commoner who has wished to exercise his right. *Wells* v. *Watling* (7); *Hobson* v. *Todd* (8); *Atkinson* v. *Teasdale* (9) all shew the difference between the case to be made against the lord and the case against a stranger. The acts here done by the lord and his assigns are *primâ facie* lawful. Mr. Justice *Stirling* held that they were an interference with the legal rights of the commoners. A trespass is an interference with a legal right, but a digging turf by the lord of a manor is no interference with any legal right unless it be shewn that it interferes with the actual enjoyment by the commoners of their rights of common. Here there is no evidence whatever that any single person desiring to turn his proper number of sheep upon the common has ever been prevented from exercising that right to the full, and there is overwhelming evidence that there always has been abundance of common for all the commoners who have chosen to exercise their rights.

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(1) 3rd Ed. p. 19.

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(1) 10 Ex. 196.
(2) 2 Q. B. D. 433, 449.
(3) 1 Wm. Saund. 346 b.
(4) 9 Rep. 111 b.
(5) 4 Ch. D. 667.
(6) 11 Ch. D. 798.
(7) 2 W. Bl. 1233.
(8) 4 T. R. 71.
(9) 3 Wils. 278; 2 W. Bl. 817.

Rigby, Q.C., and *Hopkinson*, for the Plaintiffs:—

There is no doubt that Lord *Egmont* claimed and exercised a right of common in respect of *North Tadworth*. The origin of it may be unknown, but as it might have a legal origin the fact of user is sufficient to establish the existence of the right. It may of course be shewn that the common is stinted; but if there has been a turning out of all the sheep a man has, the presumption is that each commoner, in respect of his tenement, has a right of common for all cattle levant and couchant on his land. Then as to non-user, we submit that the evidence on that head is quite irrelevant. If the Plaintiffs have once established their right, there is no obligation on them to keep sheep on the common. Their right rests unaffected for as many years as they choose. Nothing can avail against them short of evidence of acts from which the Court can presume a release. The expression "abandonment" is misleading; it must be release and nothing else.

[BOWEN, L.J.:—All the Court feel that the strength of the argument against you lies in the contention that, according to the law in *Lake* v. *Plaxton* (1), and *Lascelles* v. *Lord Onslow* (2), the measure of sufficiency is whether there is common to meet the probable actual wants of the commoners, to be ascertained by looking at the actual existing user, and taking a reasonable prospect and retrospect.]

Lascelles v. *Lord Onslow* does not lay down any rule of law whatsoever. It was never meant by the decision in that case to alter what had been understood to be the law for centuries. All that was there decided was that where there is no other evidence, and no possible means of measuring the common by the ordinary test, and no attempt to do so, the actual user for the past ten years is some evidence upon which the Court can act. The proper mode of testing sufficiency of common is that adopted under the writ of admeasurement, the ancient real writ abolished by the statute of 3 Will. iv. (3 & 4 Will. iv. c. 27, s. 36): *Williams* on Rights of Commons (1), referring to *Stephen's* Blackstone (2). The writ was issued, and every tenant counted up, and his legal right ascertained. In that way only is it possible to ascertain whether or not there is sufficiency of common. If a common will carry 1000 sheep and the commoners are ascertained to be entitled to place 900 sheep on the common, the lord can turn out 100 and no more.

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(1) 10 Ex. 196.

(2) 2 Q. B. D. 433.

[Bowen, L.J.:—Suppose for twenty years they turn out none, can he not turn out 200?]

No. The rights of the commoners remain.

Lake v. *Plaxton* (3) only decided that where the Crown has the right of making a forest, the rights of the lord and commoners are absolutely unaffected. The forestal rights leave the lord and commoners *inter se* where they were before. Whether the lord approves or not, the rights of the Crown remain: the lord cannot raise a fence which will prevent the deer coming on the approved land.

[Fry, L.J.:—If so, it is very difficult to understand the judgment in that case. What do the words (4) "the right in question" mean? The right *per se*, or the right under the circumstances of the case?]

The right *per se*. The reasoning of the learned Chief Baron is that the right of the Crown ought not to be looked at at all, and he would have decided the case in the same way if the common in question had been stocked with deer for the last twenty years.

[Fry, L.J., referred to the report of *Lake* v. *Plaxton* in the Law Journal Reports (5).]

On the contrary view the sufficiency of the common might vary from to day, and an approvement which was lawful one day might become unlawful the next. The *Statute of Merton* makes the measure of sufficiency depend on that which belongs to the tenements of the commoners, not in any way on user. The words are "*quantum pertinet ad tenementa sua*" where "*quantum*" is the adverb.

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(1) Page 121.

(2) Vol. iii. p. 238.

(3) 10 Ex. 166.

(4) Ibid. 200.

(5) 24 L. J. (Ex.) 52.

Then it is said that the commoners must shew actual damage —that their beasts when brought to the common could not get sufficient food. That is not so. It is actual injury, not actual damage, which must be shewn. When the lord surcharges, there is actual injury. The authorities are clear that it is sufficient to shew that there is injury to the right: *Wells* v. *Watling* (1). Actual user is immaterial. So a licensee must shew first that he has a license and secondly that sufficient common is left; if not, his license is of no avail: *Hobson* v. *Todd* (2) and see also *Atkinson* v. *Teasdale* (3); *Greenhow* v. *Ilsley* (4); *Willis* v. *Ward* (5). If the action is brought against the lord, though it is enough to shew actual injury to the right, yet, inasmuch as the lord has a residuum of right, it is necessary, in order to make him a wrongdoer, to allege that there is not sufficiency left. In *Hall* v. *Byron* (6) it was said that the lord may take gravel, &c., in the waste so long as he does not infringe the commoners' rights, his rights existing by reason of his ownership of the soil subject only to the interests of the commoners.

The existence of the prescriptive rights is immaterial in considering the rights of the Plaintiffs; if such prescriptive rights are shewn to exist, the Plaintiffs are entitled to an injunction because the Defendants claim to pare turf having regard only to the rights of the freeholders and copyholders.

Then it is said that if the Plaintiffs' contention is right the common never was sufficient. That is not material. If a common is already insufficient, all the more reason is there that it should not be made more insufficient.

Carr v. *Lambert* (7) shews that where there is user such as in *North Tadworth* the proper conclusion is that a right of common exists of the nature known to the law, and that, although there be a difficulty, it must be treated as existing for cattle levant and couchant upon the commoners' land.

(1) 2 W. Bl. 1233.
(2) 4 T. R. 71, 73.
(3) 2 W. Bl. 817.
(4) Willes, 619.
(5) 2 Chitty, 297.
(6) 4 Ch. D. 667.
(7) Law Rep. 1 Ex. 168.

The onus of proof is on the lord that he has left sufficient common: *Bullen and Leake* on Pleading (1). Common appurtenant is limited to the cattle levant and couchant on the tenement to which it is appurtenant: *Morley* v. *Clifford* (2); *Chitty* on Pleadings (3).

[COTTON, L.J.:—Ought the Court to interfere when the withdrawal by the lord is not of any right which the commoners wish to exercise, and when the Plaintiffs suffer no damage?]

The measure of the right is the grant, and that also measures the injury. The Plaintiffs have established turbary, estovers, and pasture as commonable rights appendant. Common appendant is the common right originally attached to arable lands, to depasture commonable beasts on the wastes of a manor, without which right, having regard to the then existing state of husbandry, the arable lands could not have been enjoyed: *Tyrringham's Case* (4). That is the nature of the original grant, and it probably took its origin in the vill, or ancient village community, although it has been in many cases ascribed by legal fiction to a lost grant. But, whatever its origin, the grant is for a sufficiency of pasture for the sheep levant and couchant at the time of the grant. It is, moreover, no varying grant, and the right still continues to exist and to attach to the land, notwithstanding that the original character of the land has been altered, for instance of being made into a garden or orchard: *Carr* v. *Lambert* (5), and the lord must always leave sufficiency of common of pasturage for all the commonable beasts which are entitled to feed upon it: *Arlett* v. *Ellis* (6). From the point of view of the dominant tenement the measure of the right is the capacity of the waste for sheep. Wherever gorse or furze could grow, the lord must not inclose area under the *Statute of Merton: Hall* v. *Byron* (7).

[FRY, L.J.:—The position of the tenant before the *Statute of Merton* was that of the dog in the manger. Is not the intention

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(1) 3rd Ed. 715; 4th Ed. pt. ii. 356.

(2) 20 Ch. D. 753, 757.

(3) 1st Ed. 1836, pt. 1, p. 510.

(4) 4 Rep. 36 b.

(5) 3 H. & C. 499; affirmed Law Rep. 1 Ex. 168.

(6) 7 B. & C. 346, 369.

(7) 4 Ch. D. 667.

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of that statute to enable the landlord to use what the tenant cannot use?]

It may rather be put thus: The lord may inclose because the dominant tenement has more than it is entitled to. The tenant is always to have his full get. In those days there was no artificial food such as oil cake for the sheep, and they could not be kept without pasture. The grant was for the entire sustenance of the sheep during the ordinary months of the year. The statute is not against user, it does not draw us away from the grant; and all grants must be construed according to the circumstances under which they were originally made. It must be borne in mind that the grant cannot be lost or extinguished, except by release, abandonment, or merger. And with reference to the right of paring, the limit of sufficiency is the same. In this case the evidence shews that the paring and digging of loam took place just when the pasture was best, and injured the sheep-carrying capacity of the common. The learned judge was therefore right in holding that there was an injury to the rights of the commoners, and the case falls within *Hall* v. *Byron* (1).

[FRY, L.J.:—But does the Court ever grant an injunction in such a case?]

It constantly does, in cases of light and air and the fouling of water.

If the right exists it is not necessary to shew actual injury. It was the ground of the decision in *Crossley* v. *Lightowler* (2) that the plaintiffs were entitled to an injunction to prevent the fouling of their stream, even though they could not shew actual injury.

We submit that we have established our right, that we have proved insufficiency of common, and that we are entitled to protect our right by a declaration and an injunction.

[He also referred to *Hext* v. *Gill* (3).]

Sir *Horace Davey*, in reply:—

There is no evidence of deterioration of common, of permanent injury to the turf, or of insufficiency of pasture. The Plaintiffs

(1) 4 Ch. D. 667.

(2) Law Rep. 2 Ch. 478.

(3) Law Rep. 7 Ch. 699.

say that there must be sufficiency for the full number of sheep to get their entire sustenance day and night off the common during certain seasons of the year, and that the grant is to this extent. This is not in accordance either with the evidence or the authorities. The evidence shews that the sheep were put on the common from eight or nine in the morning to five or six in the evening, after which they were folded on the farms; and *Tyrringham's Case* (1) shews that this was the old practice also, for otherwise how are they to "compester" the farms if they remain on the common?

The original grant judged by the user, was by no means for the whole sustenance of the sheep. The real question is what are the actual requirements of the commoners: *Lascelles* v. *Lord Onslow* (2); *FitzHerbert's Natura Brevium* (3); Law of Commons, Anon. (4); *Williams* on Rights of Common (5); *Lake* v. *Plaxton* (6).

1889. Dec. 21. FRY, L.J., delivered the judgment of the Court, *Cotton, Bowen,* and *Fry,* L.JJ.:—

The Plaintiffs in this action sue as tenants of the manor of *Banstead,* and the Defendants defend as purchasers from the lord of the manor of the freehold of the wastes of the manor. By his judgment in the action Mr. Justice *Stirling* has declared that the Defendants are not entitled to continue certain existing inclosures of parts of the waste, and has given liberty to apply for an injunction in respect of these inclosures. He has also declared that the cutting and digging by the Defendants, of the pasture herbage turf and loam in and upon certain of the wastes, constitute an injury to the rights of common of the Plaintiffs and the other persons on whose behalf they sue.

The lengthy inquiries as to facts to which this litigation has given rise were conducted partly before the learned Judge and partly before a special referee, a circumstance which has certainly not lessened the intricacy of the arguments before us.

It was, amongst other things, found by the referee that the

(1) 4 Rep. 36 b.
(2) 2 Q. B. D. 433.
(3) Ed. 1755, p. 290; Ed. 1794, p. 121.
(4) Ed. 1720, p. 80.
(5) Page 120.
(6) 10 Ex. 196.

freehold, customary freehold, and copyhold tenants of the manor were entitled to a right of common of estovers, a right of common of turbary, and a right to dig loam necessary for repairing the ancient tenements, and that the occupiers of such ancient tenements had a right to cut and take fern, brake, and furze for fuel. No controversy appears to have been raised before the learned Judge, and none certainly has arisen before us, as regards these rights, and they must, therefore, be taken as established. With regard to the declaration as to inclosures and the liberty to apply for an injunction in respect of them, the Appellants did not at the Bar contest the propriety of the judgment of the learned Judge. The controversy before us was therefore confined to the propriety of the residue of the judgment.

According to the finding of the referee, or the admissions before us, the tenants of the manor were entitled to common appendant for 640 sheep, and in addition to this the referee found that certain lands outside the manor were entitled to common appurtenant as follows:—*South Tadworth*, for 200 sheep; *North Tadworth*, 876; *Canon's* and *Reed's Rest*, 640, making a total in respect of common appurtenant of 1716, which, added to the 640 in respect of common appendant, gave a gross total of 2356 sheep. Mr. Justice *Stirling* dissented from the finding of the referee to this extent, that he held *North Tadworth*, and *Canon's* and *Reed's Rest*, each entitled only to common for 300 sheep, thus reducing the grand total to 1440 sheep. Of these rights of common the only one which has been in controversy before us is that of *North Tadworth*, in respect of which it has been contended on the one hand that the number of sheep ought to be restored to the finding of the referee, and, on the other, that no right of common exists.

The first point was raised on an agreement between the parties as to the rate of two sheep per acre, at which common was to be taken, and it was to this that the cross appeal was directed. This agreement was held by the learned Judge, and we think rightly, to apply only to common appendant. The question whether *North Tadworth* is or is not entitled to common arises only with reference to the question of sufficiency, and has been argued in the absence of the owners of that estate, who are not, as such, tenants of the manor; and the owners of *North Tadworth*, *South Tadworth*, and *Canon's* and *Reed's Rest* are none of them Plaintiffs by representation in this action, and any decision in this suit will therefore not be binding if the question should arise between these owners and the Defendants. There is a considerable conflict of evidence before us as to this right. It appears from the evidence that for many years the owners of *North Tadworth* and of *Canon's* and *Reed's Rest* have each turned on to part of the common 300 sheep, and that the owners of the soil of the commons have taken no steps to question their right so to do, and there is an entry in the Court rolls that *South Tadworth* is entitled to common for 200 sheep, and we think that, without deciding anything as to the right of the owner of *North Tadworth* and of *Canon's* and *Reed's Rest* except for the purpose of estimating the sufficiency of pasture, 800 sheep must be added to the number of sheep for which the Plaintiffs, the tenants of the manor, are entitled to common of pasture.

The lord can, as is well known, exercise his right to approve, subject only to the proof by him, that the commoners have not only free egress and regress, but also sufficient pasture as much as belongeth to their tenements "*sufficientem pasturam quantum pertinet ad tenementa sua*," to use the words of the *Statute of Merton*, and the controversy before us has been on this question of sufficiency.

For several years past the pasture on the wastes has been injuriously affected by parings of the turf and the digging of flints and loam by the Defendants, and it has been found by the referee that there would be sufficient of common pasture for 543 sheep (the number admitted by the Defendants before him as having the right) if the sheep were turned out and the commons were used according to the modern and present practice of sheep farming, rearing, and management, for he found that the said common would carry 1200 sheep if used according to such practice, but that there would not be sufficient common of pasture for 543 sheep if during the usual months in the year for turning out, and in average seasons, the sheep were turned out to get all their sustenance from the common.

In reference to these findings, the Appellants have contended that in ascertaining sufficiency regard should be had, first, to the modern and present practice of sheep farming, and, secondly, to the average number of sheep which have in fact been turned out for a great number of years, and they have insisted that, taking such average number, there would be sufficient pasturage left.

On the first of these points we do not propose to express any opinion, but in our judgment the contention that the average number of sheep turned out is the measure cannot be maintained. The right of the commoner is to have pasture for the sheep which his tenement is capable of maintaining during the winter, and as the rights of common have been found to extend to 1440 sheep, and the commons have been found to carry 1200 sheep, and no more, even if used according to the modern practice, we think that this contention fails.

"It is necessary to be knowen," says the author of the treatise on "Surveyenge," usually attributed to Sir *Anthony Fitzherbert* (1539), "what is sufficient of commen and that me semeth by reson shuld be thus. To see howe moche cattell the hey and the strawe that a husband getteth upon his owne tenement will fynde sufficiently in wynter if they lye in house, and to be kept therewith all the wynter season, for soo moche cattell shulde he have commen in sommer and that is sufficient."

"If my land," said *Walmesley* and *Owen*, JJ., in *Smith* v. *Bonsall*, in the 39th year of Elizabeth (1), "to which I claim common belonging, can yield me stover to find a hundred cattell in winter, then shall I have common in summer for a hundred cattell, in the land out of which I claim common, and so for more or fewer proportionably." And in *Cole* v. *Foxman* (2) a dictum of *Coke*, C.J., on circuit, was cited and approved by *Warburton* and *Hutton*, JJ., that "so many of the cattell that the land to which the common is appurtenant may maintain in the winter, so many shall be said levant and couchant."

The right of the owner of a tenement entitled to common appendant or appurtenant is, in our opinion, not affected by the fact that his farm may be understocked: *Leech* v. *Widsley* (3), nor by conversion of arable into pasture land, nor by the fact that his land may have been put to a use which at least temporarily renders the maintenance of cattle or sheep upon it impossible. Levancy and couchancy, to adopt almost the language of Mr. Justice *Willes,* in delivering the judgment of the Exchequer Chamber in *Carr* v. *Lambert* (1), is rather the measure of capacity of the land than a condition to be actually and literally complied with by the cattle lying down and getting up, or by their being fed off the land.

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(1) Goulds. 117.

(2) Noy, 30.

(3) 1 Vent. 54; 2 Keb. 590.

It appears to us to be plain that the rights of common must be ascertained and measured in the same way in reference whether to the plaintiff in any action or to the other commoners. For each of the commoners separately and as between each of them and himself, the lord is bound to leave pasture enough to satisfy the commoner's separate right, whether such right be likely to be exercised or no; and it would be strange if, in calculating the total amount which will suffice for all, an element of uncertainty and probability were to be introduced which may not be introduced in considering the limit of each individual right. If it is no answer to one separate commoner's complaint that he himself is not likely to require to use his entire right, how can it be an answer to all collectively that some of the body are not likely to use their rights to the full? This is an action on behalf of all the commoners. The measure of the common which should be left for all, ought, we think, according to sound reason, to be that amount which will be sufficient for the enjoyment of all their existing rights, if such rights are to be fully enjoyed.

So far as the learning of counsel or our own research has gone, no early case can be adduced which is in any way inconsistent with this conclusion, or which refers to the manner of enjoyment as an ingredient in the question of sufficiency. But two cases were pressed on us as inconsistent with this conclusion. One was *Lake* v. *Plaxton* (2), where it was held that the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on a question of sufficiency of common in a case where no deer had been turned on the waste for upwards of twenty years. The ground of this decision is not very clearly stated in the judgment; it may, perhaps, have turned on the peculiar nature of the Crown right; if otherwise, the case is one which may require further consideration.

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(1) Law Rep. 1 Ex. 168.

(2) 10 Ex. 196.

In *Lascelles* v. *Lord Onslow* (1) the Court held that the fact that, notwithstanding the inclosures complained of, there had been sufficient pasture for the average number of animals which had for the last ten years at least been turned out, was evidence that the inclosures had not interfered with the rights of the commoners. The case, perhaps, proceeds upon the view that in the absence of any other evidence the actual user of the common for the last ten years might be regarded as some evidence of the extent of the rights of the commoners, and in that point of view the case may be correct. But some of the language or reasoning in the judgment appears to us open to criticism, and if the case goes beyond the view above suggested we doubt whether it can be maintained.

Neither of these cases was determined in a Court of Appeal, and there appears to be no earlier precedent for the novelty, which, according to the argument of the Appellants, has been introduced into the law of common by these cases.

In our opinion, the Defendants cannot rely upon the numbers which have in fact been turned out, to shew that there is a sufficiency of pasture left, and it follows from what we have said that the Defendants have, in our opinion, failed to shew that sufficient common has been left, notwithstanding the inclosures and the cutting and digging of turf and loam, for all persons having rights of common over the wastes; and as the acts complained of have been going on for several years, and, if unrestrained, would constitute evidence of a custom in diminution of the rights of the Plaintiffs: *Bateson* v. *Green* (2), we think that they are properly the subject of the declaration contained in the judgment appealed against.

The majority of the Court are, however, of opinion that the form of the judgment is open to objection, as appearing to contain a declaration of the rights of parties who are not before the Court, and we therefore vary the judgment of Mr. Justice *Stirling* by omitting the paragraph relative to the adoption and variation of the referee's report, and substituting therefor a declaration of the rights of the Plaintiffs in the terms of the second paragraph of the referee's report. This variation in the form of the judgment will have no effect upon the costs. The costs of the appeal and cross-appeal must be paid by the respective Appellants.

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(1) 2 Q. B. D. 433.

(2) 5 T. R. 411.

Solicitors for Appellants: *Lawrence, Graham, & Long.*
Solicitors for Plaintiffs: *Horne & Birkett.*

H. C. J.

SEARLE *v.* COOKE.

[1888 S. 1442.]

C. A.
1889
KAY, J.
June 27; *July* 1, 10.
C. A.
1890
Jan. 15, 16.

Rent-charge—Uncertainty as to Land charged—Rent-charge created in favour of Lord of Manor on Enfranchisement of Copyholds—Action by Grantee of Lord to recover Arrears and ascertain Land—Costs—15 & 16 *Vict. c.* 51, *s.* 24 [*Revised Ed. Statutes, vol. xi., p.* 312]—50 & 51 *Vict. c.* 73, *s.* 16.

A copyhold tenant of a manor is under an obligation to keep the boundaries of his tenement distinct; and if he neglects to do so the Court will direct an inquiry for ascertaining the boundaries, and, if that should be impossible, will order land of equal value to be set out in substitution. If the tenement is enfranchised the obligation to preserve the boundaries ceases, but the tenant is still liable for default which had happened before the enfranchisement.

The lord of a manor obtained the enfranchisement of a copyhold tenement under the 15 & 16 Vict. c. 51, reserving a rent-charge to himself. The boundaries had become confused before the enfranchisement, but the lord did not avail himself of the power given by sect. 24 of the Act to have the boundaries ascertained. The rent-charge having fallen into arrear, the grantee of the rent-charge brought an action to ascertain the boundaries of the land charged with the rent-charge, and if that could not be done, to have land of equal value set out in substitution:—

Held, affirming the decision of *Kay*, J., that the lord and those claiming under him did not lose their rights by reason of the lord's omission to have the boundaries ascertained under the Act; and that the Plaintiff was entitled to the relief prayed, the costs of the inquiry being reserved.

Duke of Leeds v. *Earl of Strafford* (1) followed.

Held, also, that the Plaintiff was entitled to a personal judgment against the tenant for the arrears of rent-charge accrued during his occupancy of the land.

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(1) 4 Ves. 180.

Thomas v. *Sylvester* (1) followed.

The powers given to the owner of a rent-charge by the *Copyhold Act*, 50 & 51 Vict. c. 73, s. 16, do not preclude him from enforcing his other remedies for recovering his rent-charge.

PREVIOUSLY to and on the 19th of February, 1880, the Defendant *Cooke* was the tenant on the court rolls of the manor of *Nedging-with-Newton*, otherwise *Newton Fee*, in *Suffolk*, of copyhold lands to which he was admitted at courts of the manor held on the 1st of October, 1838, the 9th of November, 1840, and the 27th of May, 1851, respectively. The admittances of the 1st of October, 1838, and the 27th of May, 1851, contained general descriptions of the lands comprised in them by reference to the names by which the same were then known and the estimated acreage. The description in the admittance of the 9th of November, 1840, was somewhat fuller, indicating, as to part of the lands comprised therein, the lands upon which the same abutted.

By three awards of enfranchisement made by the Copyhold Commissioners at the instance of the lords of the manor, and dated the 19th of February, 1880, the copyhold lands were enfranchised subject to the payment of the following annual rent-charges issuing out of the lands as the consideration for such enfranchisements, viz., £3 15*s.* 4*d.* in respect of the lands comprised in the first admittance amounting to 2*a.*, £10 11*s.* 4*d.* in respect of the lands comprised in the second admittance amounting to 37*a.* 3*r.*, and £2 8*s.* 9*d.* in respect of the lands comprised in the third admittance amounting to 8*a.*

By three several indentures dated the 20th of March, 1880, the rent-charges were conveyed by the lords of the manor to the use of the Plaintiff *Searle*, his heirs and assigns.

Cooke duly paid the rent-charges to *Searle* down to the 19th of February, 1887, but had not subsequently paid any part thereof.

By three deeds of demise dated the 7th of April, 1888, *Searle*, in exercise of the power conferred by sect. 16 of the *Copyhold Act*,

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(1) Law Rep. 8 Q. B. 368.

1887, and of every other power enabling him, demised the lands comprised in the awards respectively to the Plaintiff *Paine* for the term of 500 years upon trust by mortgage, sale, or demise of the respective lands, or by receipt of the income thereof, or otherwise, to raise and pay the rent-charge issuing thereout and the costs of so doing.

In addition to the enfranchised lands *Cooke* was entitled in fee simple to other freehold lands adjoining to and in part intermixed with the enfranchised lands.

The Plaintiffs brought this action against *Cooke* and mortgagees from him alleging that on the respective admittances of *Cooke* he neglected to present and make known the metes and boundaries of the lands to which he was admitted tenant, and had neglected to keep the boundaries, and in consequence the Plaintiffs were unable to set forth in respect of what particular lands the rent-charges were due and payable, and could not with safety distrain upon or exercise their other rights and remedies over such lands for recovering payment of the rent-charges and arrears.

The Plaintiffs claimed a declaration that *Searle* was entitled to the three rent-charges; payment of the same and all arrears by *Cooke* to *Searle;* that the particular lands charged with the rent-charges and comprised in the deeds of demise might be ascertained and the proper metes and bounds thereof determined; that if, by reason of confusion of boundaries or other circumstances, it should be impossible to distinguish or ascertain the particular lands, then such a quantity of land in the possession of *Cooke* as might be of equal value might be set out for securing the rent-charges; execution of the trusts of the deeds of demise under the direction of the Court, and the costs of the action and of all necessary and incidental inquiries.

By his defence *Cooke* admitted that he was in possession of the enfranchised lands, but stated that the metes and boundaries did not exist and had not existed for a long time previous to the admittances; that he was never called upon to present them and make them known; that the intermixture of the lands and confusion of the boundaries happened without any neglect or default on his part; and that he was and always had been willing that

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the lands should be ascertained: he submitted, however, that as he had not been guilty of any neglect or fault, and as the ascertaining of the lands and the metes and boundaries was solely at the desire and for the advantage of the Plaintiffs, the cost of so doing, as well as the costs of the action, ought to be borne by the Plaintiffs.

At the hearing the lands charged with the rent-charge of £10 11*s.* 4*d.* were to a great extent ascertained by evidence.

The action came on for hearing before Mr. Justice *Kay* on the 27th of June, 1889.

Robinson, Q.C., and *Ingpen*, for the Plaintiffs:—

The right of the lords of the manor and of *Searle* as their assign to have the boundaries ascertained is clear, and if the boundaries cannot be ascertained they are entitled to have other lands of the tenant set out in substitution: *Duke of Leeds* v. *Earl of Strafford* (1); *Willis* v. *Parkinson* (2); *Attorney-General* v. *Fullerton* (3); *Mayor of Basingstoke* v. *Lord Bolton* (4); *Spike* v. *Harding* (5). The Defendant *Cooke* suggests that this should be done at the expense of the Plaintiffs, but it was the duty of the tenant to keep the boundaries distinct. The default in doing this took place before the enfranchisement, while the copyhold tenure existed, and the Defendant is still liable for the consequences.

Renshaw, Q.C., and *W. E. Mozley*, for the Defendant:—

This action is not maintainable. It is not disputed that as between lord and copyholder, lessor and lessee, or landlord and tenant, if the latter wrongfully confuses boundaries, he is liable to an action, and to pay costs. No such relation subsists between *Searle* and *Cooke*. *Searle* is only the grantee of the rent-charges issuing out of the enfranchised lands. It is clear that whatever was done by way of confusion of boundaries took place previously to the enfranchisements, and that there has been no act or default by *Cooke* rendering an inquiry as to boundaries necessary:

(1) 4 Ves. 180.
(2) 2 Mer. 507.
(3) 2 V. & B. 263.
(4) 1 Drew. 270; 22 L. J. (Ch.) 305.
(5) 7 Ch. D. 871.

Wake v. *Conyers* (1). The obligation on *Cooke* to distinguish boundaries ceased on enfranchisement. Under the *Copyhold Enfranchisement Act* the lord at the time of enfranchisement may apply to the Commissioners to have the boundaries ascertained: 15 & 16 Vict. c. 51, s. 24. This he omitted to do, probably to save the expense of the inquiry; and he must be taken to have elected to accept the rent-charges on undefined lands. We do not deny that the lord is entitled to have the land ascertained, but it must be at his expense; and if they cannot be ascertained he is not entitled to the substitution of any other land. *Searle* can only succeed in this action by the strength of his own title. When he acquired the rent-charges he ought to have asked the lords of the manor to distinguish the lands, and he must bear the costs occasioned by his omission so to do: *Mayor of Basingstoke* v. *Lord Bolton* (2); *Clarke* v. *Yonge* (3).

The only remedies for the recovery of these rent-charges are those provided by the *Copyhold Acts*: see 4 & 5 Vict. c. 35, ss. 47, 48; 15 & 16 Vict. c. 51, ss. 17, 18; 21 & 22 Vict. c. 94, s. 10. And by the *Copyhold Act*, 1887, 50 & 51 Vict. c. 73, s. 16, the same remedies are given as are provided by the *Conveyancing and Law of Property Act*, 1881, s. 44. None of these are personal remedies; and being statutory, they supersede all others. The Legislature has been careful not to impose personal liability on the tenant where the lord compels the enfranchisement. The arrears of the rent-charges are not a debt due from *Cooke*, and there is no jurisdiction to order personal payment by him: see *Ex parte Graham* (4), explaining *Thomas* v. *Sylvester* (5).

The case is similar to that of tithe rent-charge under the *Tithe Commutation Act* (6 & 7 Will. 4, c. 71) s. 67.

[KAY, J., referred to *Bailey* v. *Badham* (6).]

Under that section it has been held that there is no personal liability: *Griffinhoofe* v. *Daubuz* (7).

[They referred also to the case of a rent-charge created by a railway company under the *Lands Clauses Consolidation Act*, 1845

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(1) 2 Tu. L. C. 6th Ed. p. 438; 2 Cox, 360; 1 Eden, 331.

(2) 3 Drew. 50, 63.

(3) 5 Beav. 523, 539.

(4) 42 Ch. D. 343.

(5) Law Rep. 8 Q. B. 368.

(6) 30 Ch. D. 84.

(7) 4 E. & B. 230.

(8 & 9 Vict. c. 18), s. 10, and to *Davidson's* Conv. (1); *Earl of Jersey* v. *Briton Ferry Floating Dock Company* (2).]

Robinson, in reply:—

The statutory remedies are not exhaustive. *Searle* is entitled to the ordinary remedies of the owner of a rent-charge: *Christie* v. *Barker* (3); *Scottish Widows' Fund* v. *Craig* (4). The jurisdiction of the Court of Equity to grant the relief prayed, the legal remedy being insufficient, is clear: *Duke of Leeds* v. *Powell* (5); *Story's* Equity Jurisdiction (6); *North* v. *Earl Strafford* (7); *Bouverie* v. *Prentice* (8); *Duke of Leeds* v. *Corporation of New Radnor* (9); *Mayor of Basingstoke* v. *Lord Bolton* (10); *Duke of Bridgewater* v. *Edwards* (11). The *Copyhold Acts* give a personal remedy: 6 & 7 Vict. c. 23, s. 7; 15 & 16 Vict. c. 51, ss. 7, 17; see in particular sect. 17 of the later Act.

Renshaw, in reply on the cases.

1889. July 10. KAY, J.:—

The Plaintiffs in this action seek to recover the arrears of certain rent-charges, and to have the lands charged therewith ascertained, or, if that is not possible, to have land of equal value set out to secure them.

The rent-charges are three, £3 15*s.* 4*d.*, £10 11*s.* 4*d.*, and £2 8*s.* 9*d.* They were created in 1880 by three awards of enfranchisement made by the Copyhold Commissioners, at the instance of the lords of the manor, of certain copyholds of which the Defendant *Cooke* was then the tenant, containing respectively 2*a.*, 37*a.* 3*r.*, and 8*a.*

The Defendant admits that he is in possession of all these enfranchised lands, but states that they are intermixed with other freehold lands of his, and that the boundaries were confused before the date of the enfranchisements. He states that this was done without any neglect or fault on his part, and that he is willing to have them ascertained at the Plaintiffs' expense.

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(1) 4th Ed. vol. ii. pt. 2, p. 575.
(2) Law Rep. 7 Eq. 409.
(3) 53 L. J. (Q.B.) 537.
(4) 20 Ch. D. 208.
(5) 1 Ves. Sen. 171.
(6) 13th Ed. vol. i. pl. 622; p. 625.
(7) 3 P. Wms. 148.
(8) 1 Bro. C. C. 200.
(9) 2 Bro. C. C. 338.
(10) 1 Drew. 270; 22 L. J. (Ch.) 305.
(11) 6 Bro. P. C. 368.

The rent-charges were duly paid down to the 19th of February, 1887, but not since. The Defendant suggests that they may exceed the present rent of the land, but, as they are in the aggregate less than seven shillings an acre, this is not probable, and has not been proved.

The Plaintiff *Searle* has acquired these rent-charges by assignment from the lords of the manor. He has executed three deeds, dated the 7th of April, 1888, by which he purported to demise the lands subject to the rent-charges to the co-Plaintiff *Paine*, for 500 years upon trust by mortgage or sale to raise them and all costs of so doing.

The general rule is that any one asserting claim to real estate in the possession of another must rely on the strength of his own title; in other words, the burden of making out his claim rests wholly upon him. So it must be if he claims any charge upon or interest in such real estate.

But where he proves, or the landowner admits, as in this case, that he is entitled to the charge, and that the landowner is in possession of the land which is subject to it, other considerations arise. The owner of a rent-charge, so long as it is duly paid, has no power or interest to ascertain whether the land charged is kept distinct from other land of the landowner who pays him, and if that landowner confuses the boundaries, or allows them to become confused, he can hardly refuse on that ground to pay the rent-charge, or call upon the owner of it to bear the expense of ascertaining such boundaries.

Many of the cases on this subject occurred before the beginning of this century. I particularly refer to *Cocks* v. *Foley* (1), in 1685, where the grounds for relief were stated to be that it was uncertain whether two rents of 2*s.* and 1*s.* per annum, which had been purchased by the plaintiff, were rent-charge, rent-service, or rent-seck, and that the boundaries of the land were uncertain, so that the plaintiff could not declare with the preciseness required in an avowry, and a precedent was referred to in which the Court of Chancery decreed payment where the rent had been constantly paid. At the defendant's request an issue was directed to try whether any and what rent was issuing out of all or any of the lands in the bill mentioned.

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(1) 1 Vern. 359.

In *Steward* v. *Bridger* (1), where a rent of 8*s.* a year for copyhold of the manor of *Ipeing* had been paid for twenty-four years to the lord of another manor, a decree was made for arrears and growing rent, it being presumed to have been severed from the manor of *Ipeing* by some grant or conveyance.

In *Holder* v. *Chambury* (2), where the claim was for a quit-rent of 7*s.*, the Lord Chancellor said that a bill of that kind might be proper where the lands out of which it was claimed were wholly uncertain, and the days of payment uncertain; "but then these things ought to be laid in the bill; else a lord may be very vexatious to a tenant, and make him spend in his own necessary defence more than three times the value of the rent. Here it is hard for the defendant, when he does not know the plaintiff's title to the quit-rent, to admit his inheritance to be for ever liable thereto." His Lordship directed the Registrar to compute the arrears, and established the right, on the ground, apparently, that it had been paid to Michaelmas, 1718, but without costs.

The jurisdiction of equity was recognised in *Duke of Leeds* v. *Powell* (3), and also that relief was given in equity only where there was no sufficient remedy at law; as where, there being a usage of payment, the owner of the rent could not distrain "because the particular lands could not be fixed on from a confusion of boundaries." But the Lord Chancellor felt great difficulty what sort of decree to make, because the defendant in that case might be charged beyond what he had received, the rent claimed being rent reserved on the grant of a manor of which there were no demesne lands.

The great expense of a commission to ascertain boundaries was referred to by Lord *Northington* in *Wake* v. *Conyers* (4), as a reason why the Court should be reluctant to make such an order. The jurisdiction, however, is undoubted, and has constantly been exercised by ascertaining the boundaries if possible, and if not, by setting out an equivalent quantity of the land of the defendant against whom the order is made.

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(1) 2 Vern. 516.

(2) 3 P. Wms. 256.

(3) 1 Ves. Sen. 171.

(4) 1 Eden. 331.

Moreover, as was said in *Attorney-General* v. *Stephens* (1), by *Cranworth*, L.C., "This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or as purchasers with notice."

It is obvious that unless the Court were to apply this remedy with care and caution it might be made an instrument of great oppression. If the owner of the rent-charge could say to a person in possession of land, "I claim a rent-charge as issuing out of your land, and if you resist my claim, the High Court will grant a commission which will put you to great expense," it would be dangerous to resist such a claim, however ill-founded it might be. That, however, cannot be done; the owner of the rent-charge must first make out, at his own risk as to costs, that the rent-charge does issue out of land in the possession of the person from whom it is claimed. When that is made out, if, by reason of the uncertainty of the position of the particular land or otherwise, the ordinary remedy by distress cannot be resorted to, and no sufficient relief can be had without the assistance of equitable jurisdiction, the Court will assist, but cautiously and with reluctance, especially where the amount of the rent-charge is small compared with the costliness of the contemplated proceedings.

If, however, as in the case before me, it is admitted that the defendant is in possession of the land charged, it seems to me that, if the legal remedy be imperfect, the Court ought not to decline to interfere, but should give the plaintiff some relief.

With respect to the two smaller rent-charges, it appears that the lands out of which they issue are uncertain, and I must therefore direct an inquiry, which will be conducted in my Chambers, if the parties are unable to agree, what are the lands charged with these two rent-charges respectively, with a direction that, if they cannot be ascertained, land of the defendant of the same extent in each case as the land so charged must be set out under the direction of the Judge in Chambers.

As to the larger rent-charge, the land is ascertained by the evidence before me. [His Lordship proceeded to state the terms of the declaration which he proposed to make indicating the land, and directing that the boundaries of a specified portion should be set out under the direction of the Judge in Chambers, unless the parties could agree. He then continued :—]

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(1) 6 D. M. & G. 111, 134.

With respect to the arrears of the rent-charges, *Thomas* v. *Sylvester* (1), and *Christie* v. *Barker* (2), seem to be distinct authorities that an action of debt may be maintained for these arrears; but, if not, under the equitable jurisdiction of the Court, an order must be made for payment in accordance with the cases to which I have referred.

I suppose the Defendant will not seriously attempt to deny that the rent of the land has been sufficient to pay these rent-charges. If he were entitled to inquiry on that subject, which, in the absence of any *primâ facie* evidence of such deficiency, I think he is not, it would be entirely at his own risk as to costs.

Sect. 16 of 50 & 51 Vict. c. 73, gives to the owner of the rent-charge all such remedies as are given by sect. 44 of the *Conveyancing and Law of Property Act*, 1881, and under that Act he has executed the three deeds of demise which I have already mentioned, and he asks by his pleadings for execution of the trusts of these three deeds. I think it would be premature to give that relief until the lands charged have been ascertained, but I will make the usual decree for execution of the trusts of those deeds, not to be acted on without leave of the Judge in person.

As I think the non-payment of these rent-charges was not justifiable, I must order the Defendant to pay the costs up to and including the trial, but all other costs I reserve specially, in order that the Court may have the means of securing that this decree may be fairly worked out, and not used in any manner oppressively. It will be sufficient to give liberty to apply as to the further costs and generally.

C. C. M. D.

C. A. From this judgment the Defendant appealed. The appeal came on to be heard on the 15th of January, 1890. The arguments followed the same lines as in the Court below.

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(1) Law Rep. 8 Q. B. 368.

(2) 53 L. J. (Q.B.) 537.

Crackanthorpe, Q.C., and *W. E. Mozley*, for the Appellant, cited *Swift* v. *Kelly* (1); *Speer* v. *Crawter* (2); *Wake* v. *Conyers* (3); *Ex parte Graham* (4); and referred to 15 & 16 Vict. c. 51, s. 24; 50 & 51 Vict. c. 73, s. 16.

Robinson, Q.C., and *Ingpen*, for the Plaintiffs, referred to *Duke of Leeds* v. *Earl of Strafford* (5); *Duke of Leeds* v. *Powell* (6); *Cocks* v. *Foley* (7); *Mayor of Basingstoke* v. *Lord Bolton* (8); *Willis* v. *Parkinson* (9); *Scottish Widows' Fund* v. *Craig* (10); *Lupton* v. *White* (11); *Thomas* v. *Sylvester* (12); *Storey's* Equity Jurisdiction (13); 4 & 5 Vict. c. 35, ss. 47, 48; 6 & 7 Vict. c. 23, ss. 1, 2, 3; 15 & 16 Vict. c. 51, s. 17.

Crackanthorpe, in reply.

COTTON, L.J.:—

The Plaintiffs in this case were purchasers from the lord of a manor of three rent-charges granted to the lord on the enfranchisement of three copyhold tenements. The metes and bounds of the lands subject to the rent-charges were not defined, but the description of the lands in the enfranchisement deeds was copied from the description under which the copyhold tenants were admitted in the court rolls. The enfranchisement took place in 1880, and was effected compulsorily by the lord under the powers of the *Copyhold Act*, 1852. Neither then nor afterwards have the particular copyhold lands been ascertained, they having been mixed up with other property of the tenant. The lord might, at the date of the enfranchisement, if he had thought fit, have obtained under the *Copyhold Act* an order for the parcels to be set out, so as to be definitely ascertained. That was not done; he apparently trusted to the tenant paying the rent-charges, and, in fact, everything went on without difficulty till 1887. Then, in consequence of agricultural depression, or for

(1) 24 L. R. Ir. 107.
(2) 2 Mer. 410.
(3) 2 Tu. L. C. 6th ed. 438.
(4) 42 Ch. D. 343.
(5) 4 Ves. 180.
(6) 1 Ves. Sen. 171.
(7) 1 Vern. 359.
(8) 1 Drew. 270; 3 Drew. 50.
(9) 2 Mer. 507.
(10) 20 Ch. D. 208.
(11) 15 Ves. 432.
(12) Law Rep. 8 Q. B. 368.
(13) 10th ed. pp. 613, 632.

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other reasons, the owner of this enfranchised property refused to pay the rent-charges, and the lord had to consider what remedy he could obtain. After some correspondence, this action was brought, seeking to have the property, which was lately copyhold, ascertained, and, if that could not be done, to have other property of the tenant set out equal in amount to the old copyhold tenements, and also asking for payment of the arrears of the rent-charge, and to enforce the trusts of a deed executed by the tenant for the purpose of putting in force the remedies given to the holder of a rent-charge by the *Conveyancing and Law of Property Act*, 1881. The Judge by whom the action was heard granted an inquiry to ascertain the property subject to the rent-charges (1) and (3). As to the property subject to rent-charge (2), the Judge found himself able, upon the evidence before him, to distinguish that property, and made a declaration to that effect; and as to the lands subject to rent-charges (1) and (3) he further ordered that, if they could not be ascertained, property of the Defendant to an equal extent should be set out and substituted for them, so as to enable the Plaintiffs to enforce their remedy by distress, and he also gave judgment for the Plaintiffs for the arrears of the rent-charges. Although the Defendant stated that he was always ready and willing to have the property subject to the rent-charges ascertained, yet this judgment was on every point strenuously opposed.

Now the question is, whether the learned Judge was right in directing the boundaries to be ascertained, and, if that was found impossible, in ordering other land to be substituted. We have not got to deal with the question which arose in several of the cases which have been cited before us; because in this case the tenant was an owner of a copyhold tenement, and I take it to be well established that it is the duty of a copyhold tenant to preserve the boundaries of his tenement, and that if he does not do so, both he and all claiming under him are answerable. On his default, and apart from the question of enfranchisement, to which I shall refer presently, the Court of Chancery would decree, as a matter of course, that the boundaries should be ascertained, and, if that could not be done, would order the substitution of other property. The decision in the case of *Duke of Leeds* v.

Earl of Strafford (1) directly established the right of the lord to enforce that remedy by a suit in Chancery. But in the present case there was an enfranchisement in 1880, and the copyhold tenure then came to an end, but it was put an end to subject to these rent-charges. What was the effect of this enfranchisement? It was agreed that it put an end to all duty on the tenant to preserve the boundaries. So it did as to the future, but not as to the past. The words in the form of enfranchisement given in the Act of 1852 are, "To hold the said lands [subject to the rent-charge secured by the certificate of the Copyhold Commissioners] unto the said [tenant], his heirs and assigns, as freehold henceforth and for ever discharged by these presents from all fines, heriots, &c., and all other incidents whatsoever of copyhold or customary tenure." It was contended that the effect of these words was to release the tenant from all the consequences of the boundaries having been confused before the enfranchisement. But in my opinion those words do not relieve him from the consequences of a previous neglect of duty while he was a copyhold tenant. He is relieved from the duty to keep them unconfused in future, but he is not relieved from liability with regard to breaches of duty already committed. Therefore, so far as that question goes, I think that the Judge was right in holding that the lord had the same remedy as if the Defendant still remained a copyhold tenant, and had failed to preserve the boundaries. That part of the judgment therefore was right.

Then the Appellant's counsel raised this point, that the lord had the power under the *Copyhold Act* at the time of the enfranchisement to have the boundaries ascertained at his own expense, and that he is confined to that right, and that, as he has neglected it, he cannot now avail himself of any right which he had before the enfranchisement. In my opinion, the mere fact that the lord did not avail himself of the right given him by that Act cannot deprive him of another right which he had—a right well known to the law. That fact may affect the question of costs, but cannot deprive him of an existing right. It was said that he made an election to take the rent-charge on lands which were unascertained;

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(1) 4 Ves. 180.

but I am of opinion that there was no case of election. The Act gave him an additional remedy; but he probably trusted that the tenant would pay the rent-charges without the necessity of putting in a distress, and for that or some other reason he did not avail himself of the remedy. The question of costs does not arise here, for the Judge has reserved the costs of ascertaining the boundaries. It is true that the Judge made the Defendant pay the costs up to the hearing, because he held that the Defendant was wrong in not paying the rent-charge and in resisting an inquiry for the purpose of ascertaining the boundaries. I think the Judge was right in taking that course.

Another point made by the Defendant was that the land subject to one of the rent-charges might have been ascertained by inspection of the deeds in the possession of the Defendant, and that if the Plaintiff *Searle* had taken the trouble to apply before the action he might have obtained inspection of the deeds. But the Defendant was not willing to give inspection; on the contrary, he stood on his strict rights, and would not give the Plaintiff any assistance, but said: "It is not for me to shew you the boundaries; you must find them out for yourself." It was his conduct which rendered it necessary for the Plaintiff to bring the action to ascertain the boundaries. That objection, therefore, also fails.

Then we come to this point. The Judge orders payment of the arrears. It is admitted that the tenant is in possession of all the land, subject to the rent-charges, and that the rents are sufficient to pay the rent-charges, but it is said that an action cannot be brought for payment of arrears of a rent-charge. It was, however, decided by *Thomas* v. *Sylvester* (1), and I think rightly decided, that such an action could be brought. In former times when real actions could be brought, a personal action for debt for payment of a rent-charge did not lie, but now that such actions are abolished all the Judges in that case laid down the right of the person entitled to a rent-charge to bring an action for debt against the tenant in possession of the land. It was indeed argued that in that case there was a distinct covenant to pay the rent-charge; but it was not the covenant of the Defendant, and it was not decided that it was a covenant running with the land;

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(1) Law Rep. 8 Q. B. 368.

and the Judges decided the case apart from the covenant and apart from any question of its running with the land. Therefore that decision is an authority in favour of the action in this case.

Lastly, it is said, that certain remedies are given by the *Conveyancing Act*, 1881, by virtue of the *Copyhold Act*, 1887, which enable the lord to obtain payment of the rent-charges, and that he cannot now bring an action as in *Thomas* v. *Sylvester* (1). I think that is wrong; the mere fact that the *Conveyancing Act* gives the owner of rent-charges certain rights does not prevent him from using his other remedies. In my opinion the judgment was right in all points, and the appeal fails.

LINDLEY, L.J.:—

In this case there is only one point on which I ever entertained any doubt, but I have come to the conclusion that on that point, as well as on all the others, the judgment of Mr. Justice *Kay* was right.

We have first to consider what the rights of the lord of the manor were just before the enfranchisement. It is settled law, and was so laid down in *Duke of Leeds* v. *Earl of Strafford* (2) that it is the duty of a copyhold tenant to preserve the boundaries of his lands. How far that duty could be pushed if the boundaries were destroyed by a volcanic eruption or a flood it is not necessary for us to determine; but if that were the case, the burden would clearly be on the copyhold tenant to shew it. Then we come upon sure ground, for, taking *Duke of Leeds* v. *Earl of Strafford* as a guide, it is clear that at the date of the enfranchisement the Court would have made an order on the application of the lord to ascertain the boundaries of the lands, and if that could not be done, to substitute other lands. That being so, the only question is as to the result of the enfranchisement. It was incidentally settled in that case that in a suit to ascertain the boundaries, if the rent-charge were in arrear, the Court of Chancery would compel payment; it would enforce the legal rights of the lord.

But a point is raised in this case by the counsel for the

(1) Law Rep. 8 Q. B. 368.

(2) 4 Ves. 180.

Appellant which I think is quite new. He said that there are certain sections in the *Copyhold Act*, 1887, enabling the lord to have the boundaries ascertained, and that when the lord might have had the boundaries ascertained, he elected to take the rent-charge on lands, the boundaries of which were uncertain, and that having exercised that election, he cannot now complain. That proposition depends on the construction of the sections, and I think they fall short of establishing it. The principal section is sect. 24, by which it is enacted that "it shall be lawful for the lord of any manor, or for any tenant of any manor, at any time hereafter, in case of any doubt or difference of opinion as to the identity of any lands, to apply to the Commissioners to define the boundaries thereof for the purpose of any enfranchisement under this Act or the said recited Acts; and the expenses of identification shall be borne by the party making such application, unless the Commissioners shall otherwise direct; and the Commissioners shall proceed, in such manner as they shall see fit, to ascertain, identify, and define such boundaries; and such identification and definition of boundaries to be made by the Commissioners shall be final and conclusive on all parties for the purposes of any such enfranchisement."

No doubt under this section the lord of the manor or the tenant might have applied to the Commissioners to have the lands defined; but neither of them did. What is the consequence? Has the lord lost the rights which he would otherwise have had? I think that cannot be said. It is true that when the enfranchisement was completed, the relation between the lord and the tenant was severed, and if the boundaries had become confused afterwards, I do not think the old obligation would have remained, but the lord would have lost his right; but in this case it is admitted that they became confused before the enfranchisement, and I do not think the lord has lost the rights which he enjoyed before.

The question of costs will be material, but the whole costs of the inquiry have been reserved; so that the judge will have to consider how far the failure of the lord to take advantage of the Act ought to affect them. My conclusion is that Mr. Justice *Kay* was right on all points.

LOPES, L.J.:—

It is settled law that a tenant is bound to keep the lands of the landlord or the lord of the manor distinct from his own, and if the boundaries became confused so that the lands of landlord or lord of the manor cannot be ascertained, the case is to be provided for by setting out sufficient of the tenant's lands in substitution. So far the law is clearly settled, and if there had been no enfranchisement in the present case there would have been no difficulty. But an enfranchisement took place in 1880, and we have to consider the effect of that enfranchisement. So far as the future is concerned, no doubt the tenant is free from all the obligations and incidents of copyhold tenure, but as to the past the enfranchisements did not destroy any rights which had then accrued to the lord. Therefore the rights of the lord are the same as before the enfranchisement, because they had accrued to him before that took place.

As to the action to recover the arrears I need not say anything, because *Thomas* v. *Sylvester* (1) is a clear authority as to that matter.

Solicitors: *Beaumont, Son, & Rigden*; *Field, Roscoe, & Co.*, agents for *Josselyn & Sons, Ipswich*.

(1) Law Rep. 8 Q. B. 368.

M. W.

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STIRLING, J.
July 13;
Aug. 7.

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Jan. 18, 20, 25.

In re UXBRIDGE AND RICKMANSWORTH RAILWAY COMPANY.

Railway Company—Parliamentary Deposit—Insolvency—Abandonment of Railway—Private Act—" Order to Wind up "—Crown, Rights of—Depositors — Creditors — Landowners — Priorities — Compulsory Powers — Notice to Treat—Abortive Contract—" Loss or Damage."

By the *Uxbridge and Rickmansworth Railway Act*, 1881, incorporating the *Lands Clauses Consolidation Act*, 1845, provision was made in sect. 34 for the return of the parliamentary deposit to the depositors on the completion of the railway; and sect. 35, which was in common form, enacted that, if the railway was not completed and opened by the time fixed, the deposit should be applicable towards the compensation of landowners and other persons whose property had been interfered with, " or who had been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act; " and if no such compensation was payable, the deposit should either be forfeited to the Crown, " or in the discretion of the Chancery Division, if the company is insolvent and has been ordered to be wound up," or a receiver appointed, should be paid to such receiver or to the liquidator of the company, " or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."

The company having become insolvent, the *Uxbridge and Rickmansworth Railway* (*Abandonment*) *Act*, 1888, which was in common form, was passed, authorizing the company to abandon their railway; and sect. 4 enacted that where, before the passing of that Act, any contract had been entered into or notice given by the company for the purchase of land, the company should be released from all liability to purchase or complete the purchase of such land, but that compensation should be made by " the company " to the owners and occupiers, or other persons interested in such land, " for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice," such compensation to be ascertained under the *Lands Clauses Consolidation Act.* Sect. 5 enacted that " subject to the provisions of this Act, and of sect. 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors," the Court might order the return of the deposit to the depositors. Sect. 6 enacted that " Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy and discharge all their debts, liabilities and engagements," whereupon (sect. 7) " the company shall be by this Act dissolved."

At the time of the passing of the Acts of 1881 and 1888 there was no jurisdiction in the Chancery Division to make any such order for winding-up a railway company as was referred to in sect. 35 of the Act of 1881, and there was no general Act under which a railway company could be wound up at all.

Under an inquiry directed upon a petition by the depositors for the return of the deposit, questions arose as to the rights of claimants against the fund:—

Held, by the Court of Appeal (*Cotton*, *Lindley*, and *Lopes*, L.JJ.), reversing *Stirling*, J., that by sect. 6 of the Act of 1888 the company had been "ordered to be wound up" within the meaning of sect. 35 of the Act of 1881; that the right of the Crown under the latter section was excluded by sect. 5 of the Act of 1888; and that, subject to the prior claims, if any, under sect. 35 of the Act of 1881, of landowners and other persons injured, the deposit was applicable to the payment of creditors *pari passu*, including, as creditors, any landowners who might prove injury or damage under sect. 4 of the Act of 1888:

Held also (affirming *Stirling*, J.), that "in consequence of the compulsory powers" of the company, in sect. 35, meant in consequence of the "exercise" of the compulsory powers; and that the mere service of a notice to treat, even if followed by a contract, was not an exercise of compulsory powers, so as to entitle the landowner to priority under sect. 35:

Held also, that even if giving notice to treat was an exercise of compulsory powers, expenses incurred by the landowner to his solicitor and surveyor in consequence of the notice, whether followed or not by a subsequent abortive agreement for purchase, did not constitute loss or damage either under sect. 35 or under sect. 4.

THE above company was incorporated by the *Uxbridge and Rickmansworth Railway Act*, 1881, authorizing the construction of a railway of about eight miles in length, and the raising of the necessary capital. The Act incorporated the *Lands Clauses Consolidation Acts*. Sects. 34 and 35 were in the common form then in use, and were, so far as material, as follows:—

By sect. 34, after reciting that pursuant to the standing orders of both Houses of Parliament, and to the Act 9 Vict. c. 20, a sum of £5838 Three per Cent. Consolidated Bank Annuities had been deposited with the Chancery Division of the High Court of Justice in respect of the application to Parliament for the present Act, it was "enacted that, notwithstanding anything contained in the said Act (9 Vict. c. 20) the said deposit fund shall not be paid or transferred to or on the application of the persons or the majority of the persons named in the warrant or order issued in pursuance of the said Act, or the survivors or survivor of them (which persons majority of persons survivors or survivor as the case may be are or is in this Act intended by the expression

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'the depositors'), unless the company shall previously to the expiration of the period limited by this Act for the completion of the railway open the same for the public conveyance of passengers."

Sect. 35. "If the company do not previously to the expiration of the period limited for the completion of the railway complete and open the same for the public conveyance of passengers, then and in every such case the deposit fund or as much thereof as shall not have been paid to the depositors shall be applicable . . . . towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been paid, and shall be distributed in satisfaction of such compensation as aforesaid, in such manner and in such proportions as to the Chancery Division of the High Court of Justice in *England* may seem fit; and if no such compensation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund or such portion thereof as may not be required as aforesaid shall either be forfeited to Her Majesty . . . . or in the discretion of the said Chancery Division, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof: provided that until the deposit fund has been repaid to the depositors or has become otherwise applicable as hereinbefore mentioned, any interest or dividends accruing thereon shall from time to time and as often as the same shall become payable be paid to or on application of the depositors."

By an Act obtained in 1886, the company were authorized to deviate part of their line and to raise further capital; and the time for the exercise of their compulsory powers was extended.

By the *Uxbridge and Rickmansworth Railway* (*Abandonment*) *Act*, 1888, which was in a form commonly used in a private Act for the abandonment of a railway, after reciting that a small portion only of the capital authorized by the Acts of 1881 and 1886 had been issued, and that the powers of those Acts with respect to the purchase of land and the making of the railways had been exercised to a limited extent only, "and it is expedient that the railways be abandoned, and the affairs of the company wound up and the company dissolved;" it was enacted (sect. 2), that the company should abandon the construction of the railways, and should, "except only as is by this Act otherwise expressly provided, be absolutely freed and discharged from all obligations with respect to the making and maintaining of the railways:" and (sect. 3) that the abandonment should not prejudice or affect the right of any landowner to compensation for damages occasioned by entry for taking levels or setting out the lines of railways, or for loss, damage, or injury sustained by him through occupation of his land for temporary purposes, or through the exercise of any of the powers contained in the *Railways Clauses Consolidation Act*, 1845, or of the Act of 1881 or of 1886.

Sects. 4, 5, 6 and 7, contained the following enactments:—

(4.) "Where, before the passing of this Act, any contract has been entered into or notice given by the company, for the purchasing of any land for the purposes of or in relation to any portions of the railways or works authorized to be abandoned by this Act, the company shall be released from all liability to purchase or to complete the purchase of any such lands, but notwithstanding full compensation shall be made by the company to the owners and occupiers, or other persons interested in such lands, for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice;" the amount of such compensation to be determined under the *Lands Clauses Consolidation Act*, 1845.

(5.) "Subject to the provisions of this Act, and of section 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors, the High Court of Justice may and shall, at any time after the passing of this Act, on application by the depositors mentioned in

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sect. 34 of the Act of 1881," order the deposit to be paid or transferred to the depositors, and thereupon the deposit should be paid and transferred accordingly.

(6.) "Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy and discharge all their debts, liabilities and engagements.

(7.) "When all the debts, liabilities, and engagements of the company are paid, satisfied or discharged, and the affairs of the company are wound up, the company shall be by this Act dissolved, and shall thenceforth forthwith wholly cease to exist, and the Act of 1881 and the Act of 1886 shall be by this Act repealed."

In consequence of the abandonment of the railways an application was made by the depositors for payment out to them of the fund in Court; and on the 10th of August, 1888, an order was made on that application directing inquiries as to the prior claims, if any, of landowners and creditors upon the fund, leave being given to any persons interested to apply in Chambers for the distribution of the fund after the result of the inquiries.

Under these inquiries four separate claims were carried in by persons who asserted the right to be paid in priority to any right of the depositors.

The claimants were *John Macintyre*, a judgment creditor of the company, and three landowners, namely, *Benjamin Way*, *Henry Grainge*, and Messrs. *William* and *Samuel Harman*.

The applications were adjourned into Court to be argued as test cases as to what claims were admissible under the order for inquiries.

In the course of the hearing of the several applications it appeared that there is, apparently through the oversight of the Legislature, a singular absence of any statutory provision for the winding-up of railway companies incorporated since 1867.

The present state of the law is as follows:—

The *Abandonment of Railways Act*, 1850 (13 & 14 Vict. c. 83), at first applied only to railway companies "authorized by Act of Parliament theretofore passed."

The *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), s. 31, provided that the Act of 1850 should "extend and apply to all companies authorized to make railways by Act of Parliament passed before the then present session."

Under sect. 31 of the Act of 1850 and sect. 31 of the Act of 1867, a shareholder of any company to which the Acts applied might present a winding-up petition under the *Companies Act*, 1862. Then the *Abandonment of Railways Act*, 1869 (32 & 33 Vict. c. 114), which contained further provisions for the winding-up of a railway company authorized to abandon its railway, enacted (sect. 3), that that Act "should be construed as one with" the Act of 1850 as amended by the Act of 1867; the Act of 1869 thus applying only to railway companies in existence prior to the session in which the Act of 1867 was passed.

The *Companies Act*, 1862, s. 199, excepts "railway companies" from the provisions of that Act, which therefore apply to no railway companies other than those to which it is made applicable by sect. 31 of the Act of 1867.

The result is that there is no general Act providing for the winding-up of any railway company incorporated since 1867, a fact which seems to have been overlooked by the Legislature when passing, since that date, any private Act for the abandonment of a railway, the common form in use in Acts of that class apparently assuming, as in the present instance, the existence of some statutory provisions applicable to the winding-up of any railway company, irrespective of the date at which it may have been incorporated.

MACINTYRE'S CASE.

Macintyre, who was the company's late engineer, had obtained judgment against the company for £2144 6*s.* 2*d.*, being the amount of his charges for work done, and costs. Being unable to obtain payment, he issued execution, but the company proved totally insolvent, its sole assets being 5*s.*

Macintyre accordingly claimed payment of his judgment debt and costs out of the deposit in Court.

The case was heard by Mr. Justice *Stirling* on the 13th of July, 1889.

Hastings, Q.C., and *Farwell*, for *Macintyre*, contended that sect. 6 of the Act of 1888 operated as a winding-up order so as

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to admit the claims of general creditors under the latter part of sect. 35 of the Act of 1881.

Beale, Q.C., and *Ingle Joyce*, for the depositors, relied on *In re Birmingham and Lichfield Junction Railway Company* (1).

STIRLING, J. :—

I adopt in this case the words with which the late Master of the Rolls commenced his judgment in *In re Birmingham and Lichfield Junction Railway Company* (2) : "I regret to say that I cannot assist the Petitioner. It does appear to me that what the Legislature intended was that these *bonâ fide* debts should be paid, but upon the condition that there should be either a winding-up order or a receiver. Neither of these conditions has been complied with in this case." It is not contended that anything in the Act of 1888 affects the case, therefore the claimant is driven to rely upon the provision in the Act of 1881. He is simply a general creditor of the company, and does not fall under the class of cases where the claimant is a landowner. Now the only provision for the protection of creditors which occurs in the Act of 1881 is the 35th section, which enacts that "in the discretion of the Chancery Division, if the company is insolvent and has been ordered to be wound up or a receiver has been appointed," the deposit fund shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof.

The simple question then is, has the company been ordered to be wound up? It is admittedly insolvent. Has it been ordered to be wound up? An order by a competent Court of jurisdiction has certainly not been made, nor any order, unless it be that the statutory enactment contained in sect. 6 of the *Abandonment Act* is an order, and that enactment is simply a provision that "forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy and discharge all their debts, liabilities and engagements."

It is contended that that is a direction by Parliament to the company which renders it incumbent on them to proceed to wind up their affairs, and not to carry on business any more; and, that if they do, if they engage in any business other than winding-up their affairs and paying and satisfying and discharging their debts and liabilities, these acts are illegal notwithstanding any powers which they may have. That may be so, but to my mind the direction so given is not an "order." In my opinion the company has not been "ordered" to be wound up. It is said that no possible meaning can be attached to the word "ordered" if I put that interpretation upon it; but, in the first place, I may again refer to what was said by the late Master of the Rolls in *In re Birmingham and Lichfield Junction Railway Company* (1), that it might be that, if the Board of Trade did grant a warrant, a winding-up order could be made. Further than that, the Legislature, when passing the Act of 1881, might very well have contemplated that a clause might be introduced into any *Abandonment Act*, not in the form of sect. 6, but in another form, which is sometimes found, namely, a form conferring power on the Court to wind up the railway company, and in that case a winding-up order could be made. The Legislature in this case has not thought fit to empower the Court to make such an order; and it does not appear to me that sect. 6 is an order within the meaning of sect. 35 of the Act of 1881. I hold, therefore, that this claim fails. As to the costs, I shall follow the precedent as regards costs of *In re Birmingham and Lichfield Junction Railway Company* and make no order.

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(1) 18 Ch. D. 155.

(2) 18 Ch. D. 157.

GRAINGE'S CASE.

Grainge was a landowner on whom the company had served a notice to treat under sect. 18 of the *Lands Clauses Consolidation Act*, 1845, in compliance with which he delivered to them, in the usual way, a claim for a fixed sum as purchase-money and compensation. No further steps, however, were taken by the company towards acquiring the land specified in the notice to treat, and *Grainge's* present claim was for the costs and charges incurred by him to his solicitors and surveyor subsequent to and in consequence of the notice.

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(1) 18 Ch. D. 155, 158.

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HARMAN'S CASE.

The company having served Messrs. *Harman* with a notice to treat in respect of certain lands of which they were co-owners, they duly delivered their particulars of claim. The company not acceding to the claim, and delaying to proceed to summon a jury to assess compensation, Messrs. *Harman* commenced an action in the Queen's Bench Division for a mandamus to compel the company to issue their warrant to the sheriff to assess compensation, and served notice of motion accordingly, but before the motion was brought on it was withdrawn at the request of the company, who undertook to pay Messrs. *Harman's* costs of it. This was followed by an agreement between Messrs. *Harman* and the company, by which the company agreed to purchase the lands in question for a certain sum, and to pay Messrs. *Harman* a sum for their solicitor's preliminary charges, also the costs of the action for mandamus, and also a sum for their surveyor's fees, together with the costs of their solicitor incident to the agreement and pursuant to the *Lands Clauses Consolidation Acts*. Messrs. *Harman* incurred subsequent costs to their solicitor in making out title, but the company never completed the purchase, and Messrs. *Harman* now claimed a sum for compensation and also the unpaid costs and charges incurred by them to their solicitor and surveyor.

Grainge's Case and *Harman's Case* were argued before Mr. Justice *Stirling* on the 13th of July, 1889.

S. B. L. Druce, for *Grainge*, contended that he was entitled to compensation under sects. 4 and 5 of the Act of 1888, on the ground that the service of the notice to treat, though abortive, created the relation of vendor and purchaser, service of the notice being an exercise by the company of their "compulsory powers" within the meaning of sect. 35 of the Act of 1881.

Grosvenor Woods, for Messrs. *Harman*, adopted the same contention.

Beale, Q.C., and *Ingle Joyce*, for the depositors, *contrà*, contended that the mere sending of a notice to treat did not amount to an exercise by a company of its compulsory powers: *Guest* v. *Poole and Bournemouth Railway Company* (1).

STIRLING, J.:—

So far as these claims are founded on sect. 35 of the Act of 1881, I think they fail. They are cases of this nature. The company, having compulsory powers of taking lands conferred on them by the Act of 1881, proceeded to give notice to treat in accordance with sect. 18 of the *Lands Clauses Act*, 1845. Thereupon the owners of the lands proceeded at once, as they very naturally would do, to consult their solicitors and surveyors as to the value of the property comprised in the notice to treat. In one case the matter apparently went no further. In the other case, after some proceedings taken as against the company, it resulted in a contract. The question which I have to decide upon this clause is—are these persons persons who have been "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act"? It is contended that I ought to read that as, persons who have been "subjected to injury or loss in consequence of the existence of the compulsory powers of taking property conferred upon the company." That is one contention. On the other hand, it is said that I ought to read it as, persons who have been "subjected to injury or loss in consequence of the exercise of the compulsory powers of taking property conferred on the company by this Act." It seems to me that, looking at the rest of the section, I ought to read it in the latter way and not in the former; that is to say, I ought to hold that the persons who are there referred to are persons who have been subjected to injury or loss in consequence of the exercise of the compulsory powers. That seems to me to be the natural meaning. If, on the other hand, I hold that any person who has been subjected to injury or loss in consequence of the existence of the compulsory powers is entitled to compensation, and that loss is occasioned the moment a man consults his solicitor or his surveyor, to whom he has to pay fees for the advice he gets, then it would follow that the instant an Act was passed, before any notice to treat was given at all, any person who thought that he might be affected by the passing of the Act, and thereupon proceeded to consult a surveyor or solicitor, would have a claim in respect of the fees which he paid to either of them. It seems to me that that is far too wide, and cannot reasonably be held to have been in the contemplation of the Legislature when they passed such a section as this.

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(1) Law Rep. 5 C. P. 553.

Then it seems but reasonable that any person who has been subjected to injury or loss in consequence of the exercise of the compulsory powers to take land should be compensated. The only question is whether what has been paid by the landowner, in consequence of the notice to treat being served, constitutes an injury or loss in consequence of the exercise of compulsory powers. It seems to me that the case to which I have been referred by Mr. *Phipson Beale*: *Guest* v. *Poole and Bournemouth Railway Company* (1), decides that point by saying in express terms that the mere service of a notice to treat does not constitute an exercise of the compulsory powers. Each of the learned Judges who formed the Court on that occasion says so. Mr. Justice *Willes* says (2): "It is obvious that that notice to treat may or may not be followed by an agreement between the parties. It is a neutral proceeding. It may be an amicable proceeding, or it may be a hostile one within the operation of sect. 16. There may also be an intermediate case; the proprietor of the land may be willing to sell the land at such price as a jury may assess its value at. In that case the land would be taken with his assent, but subject to a valuation." Mr. Justice *Montague Smith* says (3): "The giving of notice is not a putting in force of the compulsory powers of the Act. It may either lead to an agreement, or it may be a step towards the exercise of the compulsory powers. In itself it is a neutral proceeding." The present Master of the Rolls says (4): "A notice to treat assented to by the landowner would not be an exercise of the compulsory powers. But a notice to treat not assented to,—in which case the company would be placed in a situation of hostility to the landowner,—would be." He puts it, "that the notice now in question, having been assented to by the plaintiff, is not an exercise by the company of the compulsory powers conferred on them by the *Lands Clauses Act*, 1845, or their special Act." Therefore, it seems to me that where the notice to treat is given and is followed by nothing more, it is simply a neutral proceeding, and is not in itself an exercise of compulsory powers. Where it ends in a contract which is assented to, that again is not an exercise of compulsory powers. I think, therefore, so far as the claims are founded on sect. 35, they fail. So far as they are founded on sect. 4, I shall take time to consider my decision.

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(1) Law Rep. 5 C. P. 553.
(2) Ibid. 557.
(3) Law Rep. 5 C. P. 558.
(4) Ibid. 560.

WAY'S CASE.

Way's claim was (1) for a sum for compensation and damages by reason of the non-completion of the purchase by the company from him of his land at the price of £300 per acre, under a provisional agreement between the promoters of the company and himself, confirmed by a subsequent agreement between the company and himself, and also under a notice from the company specifying 15A. 2R. 13P. as the quantity of land required to be purchased; the sum claimed being the difference between the agreed purchase-money per acre and the present market value of the land; and (2) for his costs and charges incurred by him to his solicitors and surveyor in consequence of the company's notice and the contracts.

The case was argued before Mr. Justice *Stirling* on the 13th of July, 1889.

Hastings, Q.C., and *Gaselee*, for *Way*, contended that they were entitled, in the first instance, as against the "company," to compensation, under sect. 4 of the Act of 1888, for non-completion of the purchase from them, and that, as the company were insolvent, they were entitled under sect. 5 to be paid such compensation out of the deposit, that being a fund intended expressly for the protection of landowners.

Beale, Q.C., and *Ingle Joyce*, for the depositors.

At the conclusion of the arguments his Lordship reserved judgment, which he delivered on the 7th of August, 1889, as follows:—

Stirling, J.:—

These were certain applications adjourned into Court with the view of obtaining the opinion of the Judge on what claims are admissible under an order, made on the 10th of August, 1888, directing inquiries with a view to the distribution of a fund paid into Court by the promoters of the undertaking pursuant to the Standing Orders of both Houses of Parliament under the statute of 9 Vict. c. 20. The question which I have to consider on this occasion is whether a person with whom the company has contracted for the purchase of land, and who, under the *Uxbridge and Rickmansworth Railway Abandonment Act*, 1888, s. 4, is entitled to compensation from the company for damage, admitted, for the purpose of the argument only, to have been sustained by him by reason of the purchase not being completed pursuant to the contract, is also entitled to be paid such compensation out of the deposit.

The railway company was incorporated by an Act passed in 1881, and that Act contained two clauses, sects. 34 and 35, which were in the common form prevailing at that time, as regards the application of the deposit. It was enacted that, "notwithstanding anything contained in the said Act" (that is, 9 Vict. c. 20) "the said deposit fund shall not be paid or transferred to or on the application of the persons, or the majority of the persons named in the warrant or order issued in pursuance of the said Act, or the survivors or survivor of them (which persons majority of persons survivors or survivor as the case may be are or is in this Act intended by the expression 'the depositors'), unless the company shall previously to the expiration of the period limited by this Act for completion of the railway open the same for the public conveyance of passengers." That event did not happen, and therefore under that section the depositors were not entitled to the return of the deposit. Then sect. 35 went on to provide for the application of the deposit. [His Lordship then read that section, and continued:—] In the events which have happened, under those two sections, the deposit would not be paid to the promoters. Subject to compensation, as to which no question arises on this occasion, it was liable to be forfeited to the crown, and, in certain events which have not happened, to be applied under the direction of the Chancery Division, as a part of the assets of the company for the benefit of the creditors.

The policy of these sections was explained in two cases: one *In re Bradford Tramways Company* which came before the Court of Appeal (1); the other *In re Lowestoft, Yarmouth and Southwold Tramways Company*, which came before the late Master of the Rolls (2). In the *Bradford Tramways Case* Lord *Bramwell* said (3) that the scheme of the two clauses in that case was that the promoters who deposited this money, " and who are the originators of an abortive scheme, shall, if the scheme proves abortive, forfeit the deposit money, shall never get it back, nor get the benefit of it in any way." And the Court of Appeal held that even in an indirect way the depositors were not to get the benefit of the deposit. By an Act of 1886 the time for completing the works and for the exercise of compulsory powers was extended. We then come to the Act of 1888, by which the abandonment of the undertaking was authorized. [His Lordship then read sects. 3, 4, 5, 6 and 7 of the Act of 1888, remarking as to sect. 7: I read that in this way, that the dissolution of the company is not to take effect, nor the Acts of 1881 or 1886 to be repealed, unless and until all the debts, liabilities, and engagements of the company are paid, satisfied or discharged, and the affairs of the company wound up. He then continued:—] Now, the question arises on sect. 5, and I must say that the terms of it are hardly so clear as might be desirable in a matter of this sort; but I am bound to read and consider it as best I can, giving effect to the language which has been used. I am therefore of opinion, in the first place, that the words "subject to the provisions of this Act," whether read by themselves or taken, as possibly may be the better construction, in connection with the words " with respect to compensation to landowners and other persons injured, and for the protection of creditors," cannot be omitted or left out of consideration; but that a meaning must be given to them, and

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(1) 4 Ch. D. 18.

(2) 6 Ch. D. 484.

(3) 4 Ch. D. 21.

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that it is only subject to those provisions being satisfied or complied with that the depositors became entitled to receive back the deposit or any part thereof.

It is contended on behalf of the Applicants that under these words the Applicants are entitled to compensation out of the deposit. The Act, however, does not in express terms provide for compensation out of that fund. Sect. 4 is in these words: "Full compensation shall be made by the company to the owners and occupiers or other persons interested in such lands." The case of *In re Bradford Tramways Company* (1) shews clearly that the fund constitutes no part of the assets of the company. I cannot then hold that compensation is given out of the fund without doing violence to the language of the Act. I should not be justified in departing from the literal meaning of the language used, unless that literal construction would lead to some manifest absurdity. It is said that if I read sect. 5 literally the only result will be that the fund must remain in the Court for ever. I do not think, however, that this is so. I have already said the effect of sect. 7 of the Act is only to repeal the Act of 1881, when all the debts, liabilities, and engagements of the company are paid, satisfied, or discharged. It is said that this is impossible, that the debts, liabilities, and engagements of the company can never be satisfied or discharged. If that be so then the repeal will never take effect, and the provisions of the Act of 1881, including those of sect. 35, by which the fund is forfeited to the Crown, will remain in operation. The result, therefore, will be that both the depositors and the applicants will remain, so far as the fund is concerned, in precisely the same situation as if the Act of 1888 had never passed. I cannot say that such a result involves such an absurdity as to justify a departure from the literal meaning of the Act, and I am therefore of opinion that the Applicants are not entitled to compensation out of this fund.

W. W. K.

C. A.

From these decisions the several claimants appealed.

Macintyre claimed a declaration that he was entitled, *pari*

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(1) 4 Ch. D. 18.

passu, with other creditors of the company, to payment of his judgment debt and costs out of the deposit, after payment thereout of any sums found upon the inquiries directed by the order of the 10th of August, 1888, to be due, under sect. 35 of the Act of 1881, to landowners or other persons injured.

Way claimed a declaration that he was entitled to compensation and damages under the Act of 1888, and that such compensation and damages, together with his costs of preferring his claim, should be paid out of the deposit.

Grainge claimed a declaration that he was entitled to be repaid the loss or expenses incurred by him, being solicitors' costs and surveyor's charges, by reason of the notice to treat having been given by the company and of the abandonment of the railway, and that such loss or expenses, together with his costs of preferring his claim, should be paid out of the deposit.

Messrs. *Harman* claimed a declaration that they had a valid claim upon the fund for the injury or loss to which they had been subjected in consequence of the compulsory powers of taking property conferred upon the company by their Acts, and for the injury or damage sustained by them by reason of the abandonment of the railway and the purchase from them not being completed pursuant to the contract by the company with them, and that the amount of such injury, damage, or loss—to be ascertained, if necessary, by a jury—together with the costs of the claimants of preferring their claim and of the appeal, might be paid out of the deposit.

The arguments on the appeals were heard on the 18th and 20th of January, 1890.

Hastings, Q.C., and *Farwell*, for *Macintyre* :—

Under sect. 35 of the Act of 1881, the Court cannot exercise its discretion, as to the application of the deposit for the benefit of creditors, without what is technically called a "winding-up order," and the question is whether the Legislature has not by the Act of 1888, provided an equivalent for, and that which is, in effect, a winding-up order. In passing the Act of 1888 the Legislature must have intended that that Act, having regard especially to the preamble and to sects. 5, 6, and 7, should have the same effect as a winding-up order, and that the provision for creditors in the latter part of sect. 35 of the Act of 1881 should either be read into sect. 5 of the Act of 1888, or that creditors should be protected under sect. 5 alone. The learned Judge below relied on *In re Birmingham and Lichfield Junction Railway Company* (1), but in that case there was nothing whatever in the shape of a winding-up order, whereas here we have an Act which does order the company to be wound up.

The two Acts should be read together, and the later Act construed by the light of the earlier: *Maxwell* on the *Interpretation of Statutes* (2). At the time the Act of 1881 was passed there could not have been any winding-up of the company at all except by some future legislation, and the Legislature passed the subsequent Act of 1888 for that very purpose. It is therefore reasonable to say that the winding-up referred to in the second statute is the winding-up referred to in the first, otherwise there could be no winding-up at all, as the case is not covered by any of the general Acts relating to the abandonment of railways—that is to say, neither by the *Abandonment of Railways Act*, 1850, nor the *Railway Companies Act*, 1867,—which respectively apply only to railway companies incorporated prior to the latter Act,—nor by the *Abandonment of Railways Act*, 1869, which is to be "construed as one with" the Act of 1850, as amended by the Act of 1867, and therefore does not apply to any railway company incorporated since the Act of 1867; and the *Companies Act*, 1862, s. 199, expressly excepts railway companies from its operation. The absence of any general legislation on the subject applicable to this company must be taken to have been known to the Legislature when the Act of 1881 was passed. The very object of the Parliamentary deposit is to protect landowners and meritorious creditors, and we submit that such creditors are entitled to payment in priority to any landowners having claims under sect. 4 of the Act of 1888: *In re Bradford Tramways Company* (3).

Hastings, Q.C., and *Gaselee*, for *Way*:—

Our claim is under sect. 4 of the Act of 1888, which provides for compensation being made by "the company" by reason of the purchase from us "not being completed pursuant to the contract or notice;" but as "the company" has no means of paying us, we say we are entitled, as against the depositors, to have our claim satisfied out of the deposit, that being a fund intended for the protection of landowners, under sect. 5, which makes the return of the deposit to the depositors expressly "subject to the provisions of this Act, and of sect. 35 of the Act of 1881, with respect to compensation to landowners"; that is, subject to the provisions of sect. 4 of the Act of 1888 as well as to the provisions of sect. 35 of the Act of 1881. It is an extraordinary result if the deposit, which was paid in for the protection of landowners, can be taken out regardless of their claims. The meaning of sect. 5 is, we submit, that, if the company does not make good any loss to the landowner, the depositors must.

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(1) 18 Ch. D. 155.

(2) 2nd Ed. p. 40.

(3) 4 Ch. D. 18.

S. B. L. Druce, for *Grainge*:—

I claim compensation under sect. 4 of the Act of 1888 as having been served with an abortive notice to treat, and I rely on the argument in *Way's Case*. The moment notice to treat was served, the relation of vendor and purchaser was constituted.

[COTTON, L.J.:—In *Way's Case* there was a contract and notice stating the number of acres the company required, and the price to be paid. In your case there was no contract as to the price to be paid.]

No. But I have thrown away costs which I should not have incurred but for the notice to treat. It is no fault of mine that the purchase has not been completed, and I have therefore suffered "damage" by the non-completion, the expenses I have incurred being the measure of such damage. That is my case under sects. 4 and 5 of the Act of 1888; but I also rely on sect. 35 of the Act of 1881, as I claim to have suffered "loss in consequence of the compulsory powers of taking property conferred upon the company" by that Act, my "loss" being the expenses to which I have been put by the service of the notice to treat. The question is whether service of a notice to treat is an exercise by a railway company of its "compulsory powers" within the meaning of sect. 35. I submit that the words must be read as referring to the group of powers given by the *Lands Clauses Consolidation Act*, 1845, under the heading "And with respect to the purchase and taking of lands otherwise than by agreement"—"compulsory powers" meaning the powers which the company may put in operation under that heading. Service of a notice to treat is the first step either in the exercise of compulsory powers or of an amicable arrangement, and is sufficient to place the parties in the position of vendor and purchaser, whether the landowner likes it or not, the only thing left to agreement being the price: *Guest* v. *Poole and Bournemouth Railway Company* (1); *Marquis of Salisbury* v. *Great Northern Railway Company* (2); *Loosemore* v. *Tiverton and North Devon Railway Company* (3). The Act should be interpreted liberally in favour of the landowner as against the depositors.

Grosvenor Woods, for Messrs. *Harman*, adopted the previous arguments on behalf of landowners, and cited *In re Harman and Uxbridge and Rickmansworth Railway Company* (4).

Beale, Q.C., and *Ingle Joyce*, for the depositors:—

We contend that the decision is right in holding that the creditors have no claim against the deposit. Before the *Lands Clauses Act* the statute in force, as to the parliamentary deposit, was 1 & 2 Vict. c. 117, under which, when the bill was disposed of, whether by acceptance or rejection, the fund was paid out to the depositors, no other person having any claim against it. The Act now in force (9 Vict. c. 20) re-enacts the former Act with some variations, but does not differ in principle. Then the *Lands Clauses Act*, 1845 (8 Vict. c. 18), sect. 16, enacted, for the protection of landowners, that before compulsory powers were put in force the whole capital must be subscribed for. *Guest* v. *Poole and Bournemouth Railway Company* went on this—that, though the company could not have enforced their notice to treat as their capital had not been subscribed, it did not lie in their mouth to say that the giving it had no effect. In the present case the private Act of 1881, s. 35, provides for compensation being given

(1) Law Rep. 5 C. P. 553.
(2) 17 Q. B. 840.
(3) 22 Ch. D. 25; 9 App. Cas. 480.
(4) 24 Ch. D. 720.

out of the deposit; but to whom and for what? First, to landowners whose property has been interfered with or otherwise rendered less valuable by the commencement, construction or abandonment of the railway; secondly, to persons who have been subjected to injury or loss in consequence of the compulsory powers of taking land conferred on the company by the Act. It was suggested that this meant "in consequence of the existence of compulsory powers"; but Mr. Justice *Stirling* thought that an unreasonable view of the enactment, which must, we submit, be taken to mean "in consequence of the exercise of compulsory powers." *In re Potteries, Shrewsbury, and North Wales Railway Company* (1) shews that a special Act was required to enable the company to be wound up. Here the *Abandonment Act* of 1888 does not by sect. 3 give any fresh rights; it only protects existing rights from being prejudiced. Sect. 4 expressly gives compensation in certain cases to landowners. Sect. 5 does not say that the deposit is to be liable to creditors.

[COTTON, L.J.:—If the Act compels a company virtually to be wound up—there being no power to present a petition for winding-up—and refers to protection of creditors, is not that equivalent to a winding-up order?]

The case of *In re Bradford Tramways Company* (2) has been referred to; but the Act there was essentially different from the present. It has been sought to make out that notice to treat is an exercise of compulsory powers (*Marquis of Salisbury* v. *Great Northern Railway Company* (3)), but in that case it was only decided that, where notice to treat is given and possession taken, that is an exercise of compulsory powers if the landowner chooses to treat it as such. As regards *Macintyre's Case*, he is nothing but a general creditor. Now the deposit is no part of the assets of the company, and he can only get at it under the 35th section, and then only if the company has been ordered to be wound up, or a receiver has been appointed. Here there is no receiver, but it is urged that the company has been "ordered to be wound up." But the natural meaning of those

(1) 25 Ch. D. 251, 254.
(2) 4 Ch. D. 18.
(3) 17 Q. B. 840.

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words is, "ordered to be wound up by the Court," for the Court has been mentioned just before. The reference is to the winding-up of a company with the incidents of winding-up under the *Companies Act*, 1862. That is very different from a voluntary winding-up, which would not satisfy the Act. The expression in the Act of 1888 is not that the company shall be wound up, but that "the company shall proceed to wind up their affairs," and shall pay all their debts; and there is no dissolution until the debts are paid in full. That is quite different from the ordinary compulsory winding-up. If the Legislature had meant by the second Act to put the company in the same position as a company which has been ordered to be compulsorily wound up, it would have said so. "Subject to the provisions of this Act," in sect. 5, is satisfied by reference to sects. 3 and 4. We say then that a general creditor has no claim.

[COTTON, L.J.:—What do you say to "protection of creditors" in sect. 5?]

If the Legislature had intended the liability to creditors to be different from what it was under sect. 35 of the earlier Act, it would have said that the fund should be applied in payment of creditors.

[COTTON, L.J.:—The second Act takes away the power of the Court to pay the deposit to the Crown. Does it not virtually order the company to be wound up?]

If the Legislature had meant that, it would have said that it should be wound up, and would have prescribed how it should be done. As it is, there is only a direction that the company shall wind up its affairs so far as that can be done.

Hastings, in reply on *Way's Case*.

Druce, in reply on *Grainge's Case*.

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These are four appeals, raising, though as to some of them in a somewhat different way, the question as to what is to be done with regard to the fund in Court, deposited under the Standing

Orders of Parliament, when application was made in 1881 for the Act incorporating the *Uxbridge and Rickmansworth Railway Company*. The railway authorized by that Act has been abandoned, and the value of the company's assets seems to be 5*s.*, though that is a matter we have not now to deal with.

In the year 1888 an Act was obtained for the abandonment of the railway, and the question turns really on sect. 35 of the Act of 1881, and the sections to which I shall presently refer of the Act of 1888. Sect. 34 of the Act of 1881 recites that the Parliamentary deposit had been made, and then sect. 35 directs what is to be done with that money. It was not, of course, in any way assets of the company, but only a deposit which was required to be made when application was made to Parliament to give this company Parliamentary powers; and that section directed what was to be done with the deposit in the event of the company not carrying its undertaking into execution. At the time the Act of 1881 was passed there were Acts of Parliament, the *Abandonment of Railways Act*, 1850, and the *Railway Companies Act*, 1867, authorizing an application to be made to the Court of Chancery for an order to wind up a railway company which had obtained from the Board of Trade a warrant for the abandonment of its railway; but some time after the passing of those general Acts, and before the Act of 1881 was passed, the Board of Trade had come to the conclusion that, as to companies formed after 1867, they would not grant a warrant for the abandonment of a railway. Whether they were right or wrong we have not to consider; but it was, in fact, known at the time the Act of 1881 was passed, and still remained the fact at the time the Act of 1888 was passed, that the Board of Trade had come to that conclusion. I should mention that at the time the Act of 1881 was passed another general Act—the *Abandonment of Railways Act*, 1869—had been passed and was then in operation, giving further facilities, where a warrant for the abandonment of a railway had been granted by the Board of Trade, for application to be made to the Court of Chancery in the ordinary way by petition for a winding-up order against a railway company.

Now what we have to decide is whether or not, apart from the right in terms given by sect. 35 of the Act of 1881 to landowners to have compensation out of this deposit, there is any right on the part of creditors of the company to claim as against the deposit. Sect. 5 of the Act of 1888 says this: "Subject to the provisions of this Act, and of sect. 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors, the High Court of Justice may and shall, at any time after the passing of this Act, on application by the depositors mentioned in sect. 34 of the Act of 1881," order that the sum be handed over to them. Now this Act does interfere in some way with the provisions of sect. 35, because that section, after making provision out of the fund for compensation to landowners injured by the action taken by the company under their compulsory powers, did direct an alternative, namely, that what remained after making provision for that compensation should either be forfeited to the Crown, or, in the discretion of the Chancery Division, if the company was insolvent and had been ordered to be wound up, or a receiver had been appointed, should be paid to the receiver or to the liquidator, or be otherwise applied as assets of the company for the benefit of the creditors thereof. Those are, shortly, the terms of sect. 35. Unless, therefore, there has been a winding-up order, or a receiver has been appointed, the deposit, or so much thereof as is not required for compensation to landowners, is not applicable as assets of the company, and creditors of the company can have no claim as against such deposit, although they are creditors of the company.

Then practically the question comes to this, what is the effect of the Act of 1888? Does it contain a provision ordering the company to be wound up? Undoubtedly sect. 35 does contemplate a winding-up in the ordinary way by an order of the Court upon an application under the winding-up Act, because there is a reference to "the liquidator," which points to a person being appointed under a winding-up order for the purpose of distributing the assets of the company. But is the section confined to the case of a winding-up order being made by the Court? My opinion is that if we can find in the Act of 1888 that which ought to be construed as an order to wind up the company, then, although it is not that particular kind of order to wind up which is contemplated by sect. 35 of the Act of 1881, we ought to hold that that comes within the provisions of the Act of 1881, and enables us to say that the company has been ordered to be wound up, so as not to deprive the creditors of that which, *primâ facie*, Parliament intended to give them, namely, a claim against the deposit as assets of the company.

I have already shewn that sect. 5 does interfere with the claim of the Crown. I think Mr. Justice *Stirling* considered that this was not so; but the section undoubtedly does interfere with that claim, because it says that, subject to the provisions of that Act, and of sect. 35 of the other Act, with respect to compensation to landowners and other persons injured, and for the protection of creditors, the Court of Chancery may and shall order what remains of this fund to be handed over to the depositors, any claim on the part of the Crown being thus excluded. There, then, the depositors do get a benefit. Do they get that benefit without making provision for the creditors of the company? The provision for the protection of creditors is contained in sect. 35 of the Act of 1881, and it is only subject to that provision, and also to the provisions in both Acts for compensation to landowners and other persons injured being duly performed, that the depositors can claim. Sect. 5 of the Act of 1888 contains a distinct reference to the protection of the creditors, which of course means that the creditors are to have, by payment of their debts out of that fund, that protection which, *primâ facie*, sect. 35 of the Act of 1881 gives them, and it is only after payment of those debts that the depositors can claim any right to the fund.

It is singular if, when Parliament knew, at the time they passed the Act of 1888, that without special legislation no winding-up petition could be presented or order made under the *Companies Act*, 1862, they did not intend that this special Act should contain something which would enable the creditors of the company to get that benefit without any petition being presented and order made upon it; or, in other words, that the Act should contain something equivalent to a winding-up order. Then is not sect. 6 an enactment which enables us and requires us to say that the company has been ordered to be wound up? "Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy and discharge all their debts, liabilities and engagements." In my opinion that section would not enable the company, or a creditor of the company, to present a petition under the *Companies Act*, 1862, for obtaining the winding-up order which is pointed at and *primâ facie* intended by sect. 35 of the Act of 1881; but, in my opinion, it is a section which enables creditors of the company to say that the company has been ordered to be wound up. It is very true it does not say that the company "shall be wound up"; but it does say that the company "shall proceed to wind up their affairs, and shall pay, satisfy and discharge all their debts, liabilities and engagements." No doubt that is not in terms an enactment that the company "shall" be wound up; but, in my opinion, it would be too narrow a construction to put upon this section to say, "This enactment is not an order for the company to be wound up; it is only that the company shall wind up its affairs." The section orders the company to do that which, if it could be wound up under the Act of 1862 and an order were made so to wind it up and a liquidator were appointed, would be done by the liquidator; but here it is left to the company to do that which they are ordered to do, and which would have to be done by the liquidator if the company were wound up by a common order.

In my opinion, having regard to what must be taken to have been in the minds of the Legislature at the time the Act of 1888 was passed, and when they recognise as still existing in the Act of 1881, under sect. 35, some provision for the protection of creditors, we ought to give to sect. 6 of the Act of 1888 the meaning which I give to it, namely, that there is a protection for the creditors which, under sect. 35 of the Act of 1881, only exists if the company is ordered to be wound up, as has been, in fact, provided for by sect. 6 of the later Act.

One must remember that at this time, without special Parliamentary authority, there could be no winding-up under the Act of 1862 by any order, because, as I have said, the Board of Trade had refused to give, as regards companies incorporated since 1867, as this company was, any such warrant for abandonment as would enable application to be made for a winding-up order. In my opinion, therefore, the proper conclusion to arrive at is, not to force the meaning of the 6th section at all, but to give to it a construction which, under the circumstances then known to Parliament, is a proper and reasonable construction; that is, to construe it as an order by Parliament, and not by the Court of Chancery, that this company should be wound up.

Therefore, in my opinion, the provisions of the Acts of 1881 and 1888 do apply, and a protection for the creditors exists which would not have existed if there had been no order to wind up. It does exist here because, in my opinion, the company "has been ordered to be wound up" within the meaning of sect. 35, and accordingly there is power to the Court of Chancery, which I think it ought to exercise, of ordering that this fund shall be applied in satisfaction of the creditors of the railway company. But, as I have already stated, compensation to landowners under sect. 35 must be paid before the fund is so cleared that it may, in the discretion of the Court of Chancery under that section, be applied in payment of creditors.

Now let us look at the different claims before us. The first is Mr. *Macintyre*'s claim. He was simply a creditor of the company, and not in any way a landowner. He had obtained judgment, and, therefore, it is not necessary for us to say anything about the rights of a meritorious creditor: he is a creditor who has obtained judgment against the company. He has no claim under the first part of sect. 35; but, in my opinion, he will come in under the latter part of the section, which provides for the application for the benefit of creditors of the residue of this fund after providing for compensation to landowners under the first part of the section.

Then we come to the other claimants, and I think I may say that practically they appear to be creditors of the company in respect of any loss or damage that they may have sustained, either by reason of the contracts entered into by the company with them or in consequence of any notice to treat which has been given to them. Sect. 4 of the Act of 1888 does say that compensation is to be made to the owners and occupiers or other persons interested in land for any injury or damage sustained by them by reason of the purchase not being completed pursuant to the contract or notice to treat. That must

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mean, therefore, that these landowner claimants have a claim as creditors in respect of any loss they may have sustained in consequence of the contract not being completed or in consequence of notice to treat having been served upon them. But it was urged that they were entitled to something more than that; for they say, "We come under the first part of sect. 35, which gives us a right to be paid in priority out of this fund before it comes to be divided between the creditors of the company." The only thing they rely upon is really service of notice to treat, because nothing was done in exercise of the compulsory powers—if there was an exercise of the compulsory powers by the railway company—beyond notice to treat. In my opinion, it cannot be said that mere notice to treat is an exercise of the compulsory powers. It was argued that it was not necessary that there should be any actual exercise of compulsory powers, the words of the section being "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company." I cannot take that view. The mere fact that compulsory powers have been conferred upon the company is not, I think, even what is here referred to. We have, in the first place, a right to compensation given to "any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by commencement, construction, or abandonment of the railway or any portion thereof." That does not mean, because compulsory powers have been granted, but, because there has been an exercise of them; and I think it would be wrong to say that "in consequence of the compulsory powers" means simply in consequence of the existence of those compulsory powers. If that were so, directly a railway Act was passed compensation might be claimed because powers had been granted, though they could not be exercised until the capital had been subscribed. In my opinion it would be quite wrong to hold that if any loss or damage were incurred by a landowner he could come and say, "This loss has been thrown upon me by the passing of the Act of Parliament." That is not the right view of the section. In my opinion there must be some exercise of the compulsory powers to enable landowners to come in under sect. 35. One must remember, as I have said before, that this deposit is in no way an asset of the company. The only effect of that section is that certain rights are given to certain persons as against the depositors, and as against the fund which they deposit.

Then, has there been an exercise of the compulsory powers? In my opinion, there has not. It is very true the power to give notice to treat is included in that group of sections in the *Lands Clauses Act*, headed, "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Then there follows a direction that the promoters of the undertaking shall give a notice to treat in respect of the lands they require to take. But, although the direction to give notice to treat is included within that group of clauses, there may never be any step taken as regards the exercise of compulsory powers; because, if the company have not got their capital subscribed, they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely a step taken towards an agreement with the landowner in order to ascertain whether he is willing to make the contract with the railway company, the company saying, "I want that land; will you sell it to us?" In my opinion it cannot be said that that alone is an exercise of compulsory powers. We are not deciding this for the first time, because it was decided in 1870 in *Guest* v. *Poole and Bournemouth Railway Company* (1) that notice to treat was not an exercise of compulsory powers. It was said that that was not necessary to the decision of the case—that the actual decision was only that the company could not give the notice; but all the Judges (and they were Judges of considerable authority) in their judgments say that giving the notice was not an exercise of compulsory powers. And in the events which have happened here service of the notice to treat is shewn not to have been an exercise of the compulsory powers. It is very true it is a step towards the exercise of the compulsory powers; that is to say, the compulsory powers as regards the purchase of land cannot be exercised until the notice to treat has been given; but they cannot be exercised unless the capital has been subscribed. Subscribing the capital is not an exercise of the compulsory powers, although it a necessary step towards the exercise of those powers; and in the same way a notice to treat is not an exercise of the compulsory powers, though it is a step that must be taken before the compulsory powers can be exercised and put in force.

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(1) Law Rep. 5 C. P. 553.

In my opinion, therefore, these three landowner claimants can only come in so far as they can shew, just as the judgment creditor *Macintyre* can shew, that they are creditors. He is simply a creditor, and they also can only come in as creditors if they can shew that they have suffered loss under sect. 4 in consequence of the notice to treat or in consequence of an agreement to purchase not having been completed by the railway company. I differ from the judgment of Mr. Justice *Stirling*, and in the opinion which he has expressed. In my opinion, the construction I have adopted is the right construction of these Acts of Parliament. It is very true—and I ought to have mentioned it before—it would have been very much plainer if the Legislature had said in the Act of 1888, "After this any creditor or shareholder may present a petition without any warrant from the Board of Trade;" but Acts of Parliament are not always as plain as they might be, and the true construction of this Act is, in my opinion, that which I have expressed.

I think, therefore, we ought to make a declaration allowing all these four claimants to come in—the judgment creditor as a creditor of the company by reason of his judgment, and the other persons as having a right, on shewing injury or damage, under sect. 4, to become creditors of the company; all these creditors having a right to claim against the surplus of the fund remaining after payment of compensation to any landowners who may have any claim under sect. 35.

In my opinion, therefore, these appeals should succeed.

LINDLEY, L.J.:—

The case before us raises two questions: first, whether these claimants are to be paid out of the money which is in Court and represents what is called the Parliamentary deposit; and, secondly, supposing they are, whether they or any of them are entitled to any priority of payment over each other, or over other persons who have not made claims on the fund. Both those questions turn upon the construction of two Acts of Parliament, one of which, to say the least of it, is anything but clear. The Parliamentary deposit is a fund which does not belong to the company. The creditors of the company have no right to be paid out of the deposit, except by Act of Parliament. There is no *à priori* right on the part of the creditors of the company to be paid out of money provided by the depositors, and the creditors must look to the words of the statute or statutes upon which they rely to give them any claim at all upon that fund. The mere fact that they are creditors of the company will not do: that is not *ad rem*.

The Acts before us to which the Lord Justice has adverted do give the creditors of the company certain rights; and the question is, what rights? Under the first Act of 1881 the Parliamentary deposit was applicable in this way. Under sect. 35, first of all those landowners and persons who had really sustained injury by reason of the compulsory powers, or the works done by the company, were entitled to be paid in priority to everybody else. Then the rest of the fund was dealt with in this way. It was to be handed over to the Crown; but if the Court was of opinion that it would not be just to hand it over to the Crown, then the Court could, if the company was insolvent and ordered to be wound up, apply the deposit in payment of the creditors of the company. The governing idea there was this, that after paying those persons who were entitled to priority, the balance of the fund was to be handed over to the Crown, or to the creditors of the company if the company was insolvent. That is the governing idea. The language used is, "if the company is insolvent and has been ordered to be wound up"; one method of disposing of the assets of insolvent companies being by a winding-up under an order. There can be no question that when those words were used what was contemplated was an order to wind up, in the ordinary sense of that expression. There was only one sort of winding-up order familiar to lawyers or to draughtsmen of Acts of Parliament, and that was an order by the Chancery Division under the *Companies Act*, 1862. It was overlooked that such an order could not be made against a railway company without a special Act of Parliament; and when we come to 1888, when the Legislature passed an Act enabling this railway company to abandon their undertaking, the same thing was overlooked. Now in 1888 the position of affairs was this. The railway company was not a registered company under the Act of 1862: whether it could be so registered is well known to be one of those thorny points which have not been decided. At all events, it was not registered; and, not being registered, there was no procedure by which it could be wound up. It could not present a petition under the *Companies Act* of 1862: no creditor could do so: no shareholder could do so: it could not be done. Now in 1888 the Legislature was in this position. It intended the affairs of this company to be wound up, but overlooked the fact that it could not be done. It orders the company to "proceed to wind up their affairs." Now what does that mean? We must either say that this means nothing, or that it is a legislative order to wind up substituted for the order referred to in sect. 35. There is no alternative. We must either say the Act of Parliament is meaningless and utterly useless and not workable, or we must say this is a statutory order to wind up substituted for the order contemplated by the previous Act. Under those circumstances, I do not hesitate to say that the latter is the true construction and meaning of the Act of 1888. In other words, when we look at these two Acts of Parliament in order to work them together, as we must, we must hold that this company has been ordered to be wound up. It is insolvent enough, unquestionably; and the time has come and the contingency has arrived for paying the creditors of the company out of this deposit.

As I understand the judgment of Mr. Justice *Stirling*, he seemed to be under the impression that it was still in the discretion of the Judge to hand over the balance of this fund, after paying those who were entitled to it in priority, to the Crown. I cannot say that that is so on reading the section; because sect. 5 of the Act of 1888 does not say merely that "subject to the provisions of sect. 35 of the Act of 1881," but that, subject to the provisions of that section "with respect to compensation to landowners and other persons injured," this fund shall go to the creditors. That seems to me to exclude the Crown entirely.

Therefore the net result seems to me to be this, that this parliamentary deposit is to be applied in the first place in payment of those persons who are entitled to priority under sect. 35 of the Act of 1881; and, subject to that, it goes to the creditors of the company. That lets in the whole of these creditors now before us. They were all excluded by Mr. Justice *Stirling*; but I am of opinion that they should all come in.

Now I pass to the second question, whether any of these claimants are entitled to priority. They are creditors of the company and are entitled to come in and claim against this particular fund—which is not an asset of the company—by the joint operation of sects. 4 and 5 of the Act of 1888 to which the Lord Justice has alluded. But for those sections they could not come in at all. Then, are they entitled to priority? Sect. 4 gives them no title at all to priority. The two sections only give them title to be paid as creditors *pari passu* with other creditors. To make out their claim to priority they must make out that they are amongst the class of persons entitled to priority under sect. 35 of the Act of 1881. The persons so entitled are formed into two classes, the first consisting of all landowners and other persons whose property has been interfered with or otherwise rendered of less value by the commencement, construction, or abandonment of the railway. None of these claimants fall within that class; but the three landowner claimants say they come within the next class, who are thus described—"or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been paid." In my opinion they do not.

In the first place the language is peculiar. I think it is rather forcing the words to say that any of these gentlemen "have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company." I think that is straining the language. Moreover, the interpretation which has been put upon the expression "compulsory powers" in *Guest* v. *Poole and Bournemouth Railway Company* (1), and acted upon invariably and without hesitation ever since, is opposed to the interpretation contended for by these gentlemen.

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(1) Law Rep. 5 C. P. 553.

I am unable to hold that they are persons "subjected to injury and loss in consequence of the compulsory powers of taking property conferred upon the company by this Act."

That being so, the net result is this, that these claimants are all entitled to claim against this fund as creditors, but subject to the prior rights of such persons, if any, as may be entitled to priority under sect. 35.

LOPES, L.J. :—

I have had an opportunity of talking this case over with the rest of the Court, and I entirely agree with what has been said. I have only one observation to make, namely, with regard to the priority of landowners. In my opinion, even if notice to treat is an exercise of compulsory powers, which I do not think it is, I do not think that any injury or loss has accrued to any of these landowner claimants in consequence of the notice to treat. I quite agree with the rest of the Court that this appeal should be allowed.

COTTON, L.J. :—

I ought to say that I concur with what Lord Justice *Lopes* has said.

LINDLEY, L.J. :—

I also concur.

The Court accordingly made one order on all the appeals, to the following effect :—

Discharge the orders of the Court below. Declare that, subject to the payment of the costs hereinafter directed to be taxed, the funds in Court are to be applied, in the first place, in payment of compensations to the landowners and others who shall establish loss or injury under sect. 35 of the Act of 1881, by reason of the abandonment of the railway; and that the surplus of the said funds is to be applied in payment *pari passu* of the creditors of the company.

Declare that *Macintyre*, as a creditor of the company, is entitled, and that the three landowner claimants will be entitled, on proving injury or damage under sect. 4 of the Act of 1888, to rank as creditors of the company and to be paid out of the surplus of the said funds *pari passu* with the other creditors of the company.

C. A.
1890
In re UXBRIDGE AND RICKMANSWORTH RAILWAY CO.

Tax the costs of the applicants and respondents respectively in relation to the appeals and the orders of the Court below.

Order that the funds in Court be dealt with as directed by the payment schedule hereto annexed.

Solicitors: *Burchell & Co.; Thompson & Groom; Gamlen & Burdett*, agents for *Woodbridge & Sons, Uxbridge; Paterson & Sons*, agents for *W. Garner, Uxbridge; Williamson, Hill, & Co.*

G. I. F. C.

In re MUSTHER.
GROVES *v.* MUSTHER.

[1889 M. 2181.]

C. A.
1890
Jan. 27.

Will — Construction—Gift to a class—Direction that should any of them be dead before the Testatrix his or her Share should be equally divided between his or her Children—Children of Member of class who was dead at Date of Will.

A testatrix, by her will, gave the residue of her property to be equally divided between her nephews and nieces, sons and daughters of her late brothers, *G.*, *J.*, *W.*, and *C.*, and then proceeded: "but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children":—

Held, by the Court of Appeal, affirming the decision of *Kay*, J., that the children, living at the death of the testatrix, of nephews or nieces who were dead at the date of her will, did not take.

Christopherson v. *Naylor* (1) approved.

APPEAL from a decision of Mr. Justice *Kay* in Chambers.

The testatrix, *Jane Dale Musther*, spinster, who died in December, 1888, by her will dated the 12th of June, 1884, after making various pecuniary bequests in favour of several of her nephews and nieces *nominatim*, proceeded as follows: "I direct that after the payment of my funeral and other necessary expenses all the rest and residue of my property of whatever description be equally divided between my other nephews and nieces, sons and daughters of my late brothers, *George, John, William*, and *Christopher*, not before named, but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children."

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(1) 1 Mer. 320.

C. A.
1890

In re MUSTHER.
GROVES
v.
MUSTHER.

The testatrix left several nephews and nieces her surviving, and one of the nieces and two of the nephews who would, if living, have been entitled under her will to share in the residue of her property, had died before the date of her will, and had left children who were living at her death.

This was a summons taken out by the executors of the testatrix in order to have the question whether such children were entitled to share in the residue of the property of the testatrix determined by the Court. The summons was heard in Chambers by Mr. Justice *Kay*, who decided that the case could not be distinguished from *Christopherson* v. *Naylor* (1), and that the children in question were not entitled to any share in the residue.

Those children now appealed.

Marcy, for the Appellants :—

The learned Judge in the Court below considered that the question in this case was governed by the decision in *Christopherson* v. *Naylor*. That case may, however, be distinguished from the present, first, because the gift there was to each and every the child and children of my brother and sisters " which shall be living at the time of my death," and secondly, because the gift over described what had been intended for the child dying as a " legacy," not as a share, and the argument was that according to the general law a legatee must be in existence at the time the legacy is given, or it is altogether void.

The case of *In re Smith's Trusts* (2) is on all fours with the present, and there *Christopherson* v. *Naylor* was cited to the Court, but was not followed, and the Judge, *Jessel*, M.R., declined " to attribute to this testatrix the capricious intention that, if a brother died before her will, his children should not take, but that, if a brother died after her will, his children should take." In this case the primary intention of the testatrix is clearly in favour of all the children of her late brothers, and there is no reason why an intention in favour of a class, some members of which were dead at the date of the will, should not be attributed to her. *In re Sibley's Trusts* (3), where the late Master of the

(1) 1 Mer. 320.
(2) 5 Ch. D. 497, n.
(3) 5 Ch. D. 494.

Rolls referred to his own decision in *In re Smith's Trusts* (1), is another authority in our favour; and so is *Jarvis* v. *Pond* (2).

If the gift over had been of "the share which the parent would have taken," then the children of parents dead before the date of the will would clearly have been entitled, and there is no substantial distinction between those words and the expression "his or her share" in this case.

But, if *Christopherson* v. *Naylor* (3) cannot be distinguished, the decision in that case cannot be taken to be good law. *Loring* v. *Thomas* (4) and *Phillips* v. *Phillips* (5) were decisions the other way. It was dissented from in *In re Potter's Trust* (6) (where it was treated as virtually overruled), and also in *Adams* v. *Adams* (7); and it was treated as of no authority in *Parsons* v. *Gulliford* (8), while in *Gowling* v. *Thompson* (9) the Court of Appeal held that the principle laid down in *Christopherson* v. *Naylor* was displaced by the knowledge which the testator must have had of the state of the family at the time he made his will —a consideration which applies with equal force to this case.

Christopherson v. *Naylor* was indeed followed in *In re Chinery* (10), but the previous interests in that case were life interests, and Mr. Justice *Stirling*, though holding himself bound to follow Sir *William Grant's* decision, stated that he himself would have had a strong inclination to follow the opinion of *Jessel*, M.R., as seeming to him more likely to give effect to the testator's intention. I submit that there is no case against me which is not distinguishable, and that a construction which does not make the taking of the benefit by the child entirely contingent upon the period of its parent's death is by far the more reasonable one.

Theobald, for the Respondents, the executors, and the persons interested under the residuary bequest, was not called upon.

COTTON, L.J.:—

Mr. Justice *Kay* has decided this question on the ground that it is covered by *Christopherson* v. *Naylor*. I think it is; but I am not inclined to go into all the cases which have followed that decision. It is sought to distinguish *Christopherson* v. *Naylor* (1) from the present case by some slight differences, but I do not think that it can be fairly distinguished. It is enough for me to say that *Christopherson* v. *Naylor* has almost always been referred to with respect. It is true that it was not followed in *In re Smith's Trusts* (2), but in the most recent case on the subject, *In re Chinery* (3), Mr. Justice *Stirling* felt unable to treat *In re Smith's Trusts* as a binding authority, because it was inconsistent with what was laid down by *James*, V.C., in *In re Hotchkiss' Trusts* (4), and was opposed to the view of *Kindersley*, J., in *Loring* v. *Thomas* (5), and he considered himself bound to follow *Christopherson* v. *Naylor*. But the case must be decided upon the terms of the will itself, and let us accordingly look at the words of the will. [His Lordship then read the material clauses of the will, and continued:—] As I read that bequest, the gift is one to nephews and nieces of the testatrix who are capable of taking; that is, to nephews and nieces who were living at the date of the will, and those nephews and nieces were only intended to take provided they survived the testatrix, for the gift over provides for the event of any of them dying after the date of the will and before the death of the testatrix. In my opinion, that is the *primâ facie* and natural construction and meaning of those words; and no intention can be attributed to the testatrix of providing for what had happened before the date of the will. I think that Mr. Justice *Kay* was right; and I think that this case is covered not only by the decision in *Christopherson* v. *Naylor* but also by the reasoning there given.

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(1) 5 Ch. D. 497, n.
(2) 9 Sim. 549.
(3) 1 Mer. 320.
(4) 1 Dr. & Sm. 497.
(5) 10 Jur. (N.S.) 1173.
(6) Law Rep. 8 Eq. 52.
(7) Ibid. 14 Eq. 246.
(8) 10 Jur. (N.S.) 231.
(9) Law Rep. 11 Eq. 366, n.
(10) 39 Ch. D. 614.

LINDLEY, L.J.:—

I am of the same opinion. I do not think we gain much assistance in construing a will from looking at the cases. They rather confuse than assist; although where cases lay down some general rule they may be useful. I have long been familiar with *Christopherson* v. *Naylor*. That decision has often been criticised and occasionally disapproved, once, for instance, by *Malins*, V.C., in

(1) 1 Mer. 320.
(2) 5 Ch. D. 497, n.
(3) 39 Ch. D. 614.
(4) Law Rep. 8 Eq. 643.
(5) 1 Dr. & Sm. 497.

the case that has been cited of *Adams* v. *Adams* (1). But I cannot agree with him in his criticism. Personally, I approve of *Christopherson* v. *Naylor* (2), and I have always understood it to be good law. But, leaving *Christopherson* v. *Naylor* alone, let us examine and deal with the language of this will. The testatrix directs that the residue of her property is to be equally divided between her other nephews and nieces, the sons and daughters of certain deceased brothers. Now, in making that bequest is the testatrix leaving her property to somebody dead before the will is made? I cannot conceive a woman intending to leave her money to a person who is dead before the date of the will. *Primâ facie*, when a man leaves his money to people, he means to live people not to dead people. That, to my mind, is the key to the problem. Taking that as our starting point, how does the will go on? "But should any of them be dead before me." Now, who are the persons referred to as "them"? Surely not the people deceased at the date of her will. She must have been referring to the people living at the date of her will to whom she had already given her money. I think the appeal fails.

LOPES, L.J.:—

I am content to look at the words of the will, and to read it as I find it. The material words are these: "But should any of them be dead before me then I direct," &c. Whom does the testatrix mean by "them"? Surely she means those nephews and nieces who are then living, and intends to provide for such of them as shall die in the interval which shall elapse between the date at which she is speaking and her death. There is no capacity in nephews and nieces dead at the date of the will to be members of the class to whom she gave shares. The appeal fails.

Solicitor for all parties: *J. R. Eldridge*, agent for *C. J. Archer*, *Stockton-on-Tees.*

(1) Law Rep. 14 Eq. 246, 250.

(2) 1 Mer. 320.

W. W. K.

C. A.

1889
NORTH, J.
Dec. 7.

C. A.
1890
Jan. 29.

JONES *v.* WATTS.

[1889 J. 257.]

Practice — Discovery — Production of Documents — Specific Performance of Agreement to accept Lease—Right to production of Lessor's Freehold Title — Vendor and Purchaser Act, 1874 (37 *&* 38 *Vict. c.* 78), *s.* 2 [*Revised Ed. Statutes, vol. xvii., p.* 289]—*Interpretation Act* (13 *&* 14 *Vict. c.* 21), *s.* 4 [*Revised Ed. Statutes, vol. x., p.* 806].

The Plaintiffs agreed to grant and the Defendant to accept a lease of a house and land, the lease to contain stipulations for the free use by the Defendant of a drive leading to the house. The Plaintiffs having brought their action to compel the Defendant to take the lease, the Defendant by his statement of defence denied the Plaintiffs' title to demise the land and house, and alleged that they were subject to restrictive covenants, and also that the drive was not on land of the Plaintiffs, and that they had no power to give an easement over it. The Defendant applied for production of the Plaintiffs' title deeds, which they had scheduled as relating only to their freehold title.

Held, by *North*, J., that, by virtue of sect. 2 of the *Vendor and Purchaser Act*, 1874, the Defendant was not entitled to production of the deeds shewing the Plaintiffs' title to the house and land, but that he was entitled to production of the deeds shewing their title to the right of way:

Held, on appeal, that this decision as regarded the deeds shewing the title to the house and land was right, but that an agreement for a right of way during the lease was an agreement for a lease of land within the meaning of the Act, that the deeds shewing a title to grant a right of way were therefore in the same position as the other deeds, and the Plaintiffs were not bound to produce them:

Held, that the section did not prevent the purchaser from proving *aliunde* that the title was bad, and that, if he had raised a definite objection which the Court could try, he would have had the usual right of a litigant to production of documents in the possession of the other party which were relevant to the issue so raised, but that he acquired no such right by a mere denial of the Plaintiffs' title, or by a vague general allegation that the property was subject to restrictive covenants.

SUMMONS by the Defendant that he might be at liberty to inspect the Plaintiffs' title deeds, notwithstanding their objection to produce them.

The action was brought to enforce the specific performance of an agreement by the Defendant to accept a lease, which the Plaintiffs thereby agreed to grant to him.

The statement of claim contained allegations to the following effect.

The Plaintiff *M. M. Jones* was the owner of a piece of land adjoining *Maindee Hall*, and the Plaintiff *R. H. Jones* was the owner of a house, land, and premises known as *Maindee Hall*, in *Monmouthshire*. Prior to the 16th of August, 1888, negotiations took place between the Plaintiffs and the Defendant with view to the letting by the former to the latter of the piece of land, together with *Maindee Hall*, land and premises, for a term of years.

Various letters passed between the parties, which were specified but not set out in detail. The statement of claim alleged that "By the said letters it was mutually agreed by and between the Plaintiffs and the Defendant as follows:—that the Plaintiffs should grant, and the Defendant would forthwith accept and execute, a lease of the said piece of land, together with the said *Maindee Hall*, with the land and premises thereto belonging and therein defined, for the term of seven years from the 1st of October, 1888, with the option to the Defendant to determine such lease at the expiration of the first five years of such term by giving to the Plaintiff, his heirs, &c., twelve calendar months' previous notice in writing. Possession to be given on the 1st of December, 1888. At the annual rent of £250, to commence to accrue when possession was given and the stables hereinafter mentioned were completed, and to be payable half-yearly."

"By the said letters it was further mutually agreed by and between the Plaintiffs and the Defendant that . . . . that the said lease should contain stipulations for the free use of the drive to the Defendant, and a stipulation or covenant by the Plaintiffs, as regards obstructing branches, to keep the drive in a fit and proper condition."

It was alleged that the Defendant refused to perform his agreement. The Plaintiffs claimed specific performance of the agreement contained in the correspondence, and damages, or, in the alternative, damages only.

By his statement of defence the Defendant denied that he had entered into any agreement with the Plaintiffs, and, in the alternative, he said that, if any agreement was come to as alleged, the agreement was not correctly stated in the statement of claim. Par. 9: "The Plaintiffs have not, nor has either of them, any right or title to, or power to demise the premises comprised in the said alleged agreement, or any of them, and are unable to perform the said alleged agreement on their part by creating the term therein mentioned. Moreover, the said premises are subject to divers restrictive covenants affecting the use and enjoyment thereof." Par. 10: "The only access to the premises comprised in the said agreement from the high road is over a drive through certain gates standing at the entrance to the drive. It was a term of the said alleged agreement that the Plaintiffs should grant to the Defendant an easement of the free use of the said drive, and should covenant to keep the said drive in a fit and proper condition, and to clear away all obstructing branches. The said drive and the said gates at the entrance thereof, and the land on which they stand, are not the property of the Plaintiffs, who have no right or title thereto, or power to demise the same, nor any easement of way or otherwise over the same, nor any right, title, or power to grant any such easement over the same, nor any right or power to keep the drive in a fit or proper condition, or to regulate the same. The Plaintiffs are in fact unable to give to the Defendant a right of access to the house and grounds comprised in the alleged agreement from the public road, or to perform their agreement with respect to the said drive."

By their reply the Plaintiffs joined issue on pars. 9 & 10 of the defence, and further said: "The Plaintiffs will also rely on 37 & 38 Vict. c. 78, s. 2, by way of answer to the allegations in the said paragraphs. The Plaintiffs have perfect right and title and power to demise the said premises, and to grant the free use of the drive, and to stipulate or covenant, as regards obstructing branches, to keep the drive in a fit and proper condition."

On the application of the Defendant the Plaintiffs were ordered to make an affidavit of documents in their possession relating to the matters in question in the action. In pursuance of this order the Plaintiffs made an affidavit, by which the Plaintiff *M. M. Jones* said: "I have in my possession or power the documents relating to my freehold title to the property adjoining *Maindee Hall*. . . . The said documents are set forth in the first schedule hereto." And the Plaintiff *R. H. Jones* said: "I have in my possession or power the documents relating to my freehold title to the *Maindee Hall* estate. The said documents are set forth in the second schedule hereto." And both the Plaintiffs said: "We are advised and believe that all the documents before mentioned respectively relate only to our freehold title to the property out of which the lease, the subject matter of this action, was to be derived." The Plaintiffs objected to produce these documents.

In the first schedule to the affidavit was mentioned: "Copy deed of covenant relating to tithe, and deeds relating to the freehold title of the Plaintiff *M. M. Jones*, the owner in fee of the piece of land adjoining *Maindee Hall*."

The second schedule comprised :—

"1. Conveyance in fee, dated 28th October, 1873, to *William Jones*, of the freehold property known as *Maindee Hall*.

"2. Indenture, dated 29th October, 1873, containing a signed and executed covenant by the owner in fee of the soil over which the drive, mentioned in the statement of claim, passes, with and in favour of the said *William Jones*, his heirs and assigns, and to the effect that the said owner in fee, his heirs and assigns, will at all times thereafter repair and maintain at his and their cost the entrance gates on the *Newport* and *Chepstow Road* and the said drive, and that the owners or lessees, or other the occupiers, of the said *Maindee Hall*, and their respective agents and servants, shall at all times thereafter have full and free access for themselves, their horses, carriages, and carts, through the said entrance gates, and along and over the said drive, and all other reasonable use of the same as an approach to the Plaintiff's said estate.

"3. Conveyance, dated the 16th of July, 1881, from the said *William Jones* to the said *R. H. Jones* of the fee simple of *Maindee Hall* aforesaid, with the appurtenances thereto belonging, and also with the full benefit and advantage of the covenants and agreements thereto relating contained in the said indenture of the 29th of October, 1873."

The summons was heard before Mr. Justice *North* on the 7th of December, 1889.

Upjohn, for the Defendant :—

The Plaintiffs say that sect. 2 (1) of the *Vendor and Purchaser Act,* 1874, relieves them from the obligation to produce their title to the freehold estate out of which the lease to the Defendant is to be derived. The Act applies only to vendors and purchasers; not to lessors and lessees. At any rate this section has no application to the right which a litigant has to compel his opponent to give discovery of all documents in his possession which are relevant to the matters in issue. This right is a different right from that of a purchaser of land, in the absence of agreement or statutory provision to the contrary, to call for the production of his vendor's title. This Act relates to vendors and purchasers, and was not intended to alter the rules of procedure as between litigants in an action. The Act only shifts the burden of proof; the purchaser is entitled to shew that the vendor has no title, and he may do this by availing himself of the ordinary procedure in an action.

At any rate, there is nothing in sect. 2 to deprive the Defendant of the right to production of the Plaintiffs' title to the drive. They have not agreed to grant a term of years as regards the drive, but only to covenant in respect of the use of it.

Lush-Wilson, for the Plaintiffs :—

[NORTH, J. :—I do not wish to hear you as to the title deeds of the freehold estate. But why should you not produce the documents numbered 2 and 3 in Schedule 2, which relate to the drive? As regards the use of the drive, is there any agreement by the Plaintiffs to grant a term of years to the Defendant ?]

(1) Sect. 2 provides: "In the completion of any such contract as aforesaid" (*i.e.* "any contract of sale of land made after the 31st December, 1874"), "and subject to any stipulation to the contrary in the contract, the obligations and rights of the vendor and purchaser shall be regulated by the following rules; that is to say (*inter alia*)—First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold."

The agreement to covenant for the use of the drive is part of the contract to grant a term of years; the grant of the drive is ancillary to the term, and it will be derived out of a freehold estate. It is really part of the demise, and is included in the one rent. The right to use the drive might be demised, and therefore sect. 2 applies. An easement is a freehold right, and the Plaintiffs' covenant will amount in substance to a demise of the right to use the drive.

NORTH, J.:—

The Plaintiffs have entered into an agreement with the Defendant. The agreement is contained in some letters, the result of which I will take to be as it is stated in the pleadings. The agreement is, first, that the Plaintiffs will grant, and the Defendant will accept, a lease of certain property for a term of seven years. The agreement contains no condition restricting the right of the Defendant to call for the Plaintiffs' title to the property; his right to do this must, therefore, depend upon the general law, which for this purpose is contained in sect. 2 of the *Vendor and Purchaser Act*, 1874. That section deals with contracts to grant or assign a term of years, and, in my opinion, it applies as between lessors and lessees, as well as between vendors and purchasers, in the ordinary sense of the words. That being so, the contract contains, by virtue of this section, a provision that the lessee shall not be entitled to call for the lessor's title to the freehold out of which the term is to be derived. This provision is extended by sect. 13 of the *Conveyancing and Law of Property Act*, 1881, to contracts for the grant of an underlease. It is said that it is open to a purchaser who is resisting a claim for the specific performance of his contract to shew *aliunde* that the vendor has no title to the property. No doubt, the purchaser is entitled to do that, if he can. But it is said that, if he is resisting a claim for specific performance, he has a right to shew that the lessor has no title by compelling the production of the documents of title which are in the possession of the lessor, and that in so doing he will not be "calling for the title to the freehold." In my opinion he will. I think that a lessee, who is not entitled to call for the lessor's title to the freehold, is not entitled as a litigant to compel the discovery by the lessor of his title-deeds. That is the very thing which he is prevented by sect. 2 from doing; he would be calling for the title to the freehold.

But the agreement provides, in the second place, that the Plaintiffs shall enter into a covenant for the use by the Defendant of a certain drive, as a means of access to the house and land. This, in my opinion, is not a contract to grant or assign to the Defendant a term of years in the drive, and the mere fact that it is contained in the same document as the contract to grant a term of years in the house does not make it a contract to grant a term of years. That there is a clear distinction between the two agreements is shewn beyond question by the language of the Plaintiffs' reply, which asserts that the Plaintiffs have a right "to demise the said premises, and to grant the free use of the drive." Sect. 2 does not operate to protect the Plaintiffs from the production of their title, so far as the contract is a contract to do something besides granting a term of years. The Plaintiffs must, therefore, produce the second and third documents mentioned in the second schedule to their affidavit, both of which relate to the right of way, as regards which there is no contract to grant or assign a term of years.

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The Plaintiffs appealed from this decision so far as it required them to produce the two deeds relating to the right of way. The Defendant gave notice that he should contend that all the scheduled deeds should be produced. The appeals were heard on the 29th of January, 1890.

Napier Higgins, Q.C., and *Lush-Wilson*, for the Plaintiffs:—

We claim protection under the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 2. We claim to be owners of the fee of the freehold of the estate and owners in fee of this right of way. Mr. Justice *North* held that the agreement as to the right of way was a separate matter. We contend that it is not. This is not a right of way in gross; if we had simply stipulated to grant a lease of the house and land without saying more this right of way would have been enjoyed by the Defendant during the term as appurtenant to the demised property: *Thorpe* v. *Brumfitt* (1). Such a right of way can be demised: *Sheppard's Touchstone* (2); *Bacon's* Abridgment (3). If the contention of the other side is valid, that when there is litigation either party has a right to discovery of all relevant documents applies notwithstanding the provisions in the Act, a lessee has nothing to do but refuse to complete, and can obtain production of the documents which the Act expressly says he is not entitled to have produced. It would be a dangerous doctrine to hold that because an appurtenant right is expressly mentioned a title must be shewn. A covenant that a person shall have a right of way amounts to a grant: *Com.* Dig. "Chimin" (4), and if it be not confined to a term of years the covenantee is a freeholder: 2 *Blackstone's* Commentaries (5); *Hewlins* v. *Shippam* (6). The Act therefore applies.

[LINDLEY, L.J., referred to 13 Vict. c. 21, s. 4, which enacts that in an Act of Parliament "land" shall include hereditaments unless there are words to restrict its meaning.]

Cozens-Hardy, Q.C., and *Upjohn*, for the Defendant:—

There is no special contract in the agreement as to what shall be produced, so we are thrown entirely on the *Vendor and Purchaser Act*. Mr. Justice *North* considered that the Defendant was at liberty to prove the title bad *aliunde, i.e.*, by any other means than calling upon the vendees to produce their title. Under the old law even if a person agreed only for a very short lease he could call on the lessor to produce the same title as if he was selling the fee, and so put him to serious expense. If a solicitor was consulted he took care to negative this by express stipulation, but if a solicitor was not consulted the lessor was often taken in. The Act was intended only to remedy this evil, not to alter the law as to production of documents in an action.

[COTTON, L.J.:—For what purpose do you want the deeds?]

To support the allegations in paragraphs 9 and 10 of the defence. The issue that the Plaintiffs have not a title having been raised on the pleadings, we submit that the Defendant has the ordinary right of a litigant to have production of all relevant documents in his adversary's possession. To hold that the *Vendor and Purchaser Act* has taken away this right would be going beyond the object of the enactment.

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(1) Law Rep. 8 Ch. 650, 655.

(2) Page 268.

(3) Leases (A.)

(4) (D. 3) vol. iii. p. 59.

(5) Page 35.

(6) 5 B. & C. 221.

[COTTON, L.J.:—I doubt whether the issue is sufficiently raised on the pleadings by a mere denial of the Plaintiffs' title. On a reference as to title must not the question whether the title is good be determined on such an abstract of title as the Act pronounces to be sufficient?]

The rules in the Act have the same effect as if they were embodied in the contract, and it has been decided that such stipulations do not prevent the purchaser from taking objections if he can discover them outside the abstract: *Shepherd* v. *Keatley* (1); *Waddell* v. *Wolfe* (2); *Darlington* v. *Hamilton* (3). In *Nottingham Patent Brick and Tile Company* v. *Butler* (4), which was under the *Conveyancing Act*, 1881, it was held that restrictive covenants which were not disclosed were a valid objection to the title, though they were prior to the commencement of the title required by the statute.

[COTTON, L.J.:—But here you have nothing more than a general denial of title.]

The Defendant ought to be allowed to raise the issue in a general way, as he has no knowledge of the title. Moreover, we do raise the particular issue that there are restrictive covenants. In *Hall* v. *Connell* (5) and *Turner* v. *Bayley* (6), though there was a stipulation against production, still production was ordered in a suit. We contend, then, that all the scheduled deeds ought to be produced.

As to the deeds which form the subject of the Plaintiffs' appeal, we say that this agreement is not within the Act, for that it is not a contract to grant a term of years out of a freehold or leasehold estate. The Plaintiffs do not allege that they have more than an easement over the drive, and that is something very much short of an estate. As to the right of way being incidental to the lease as an appurtenance, which the Plaintiffs contend, that is begging the question, for the argument assumes that the Plaintiffs have a right of way which will pass with the house and land. As to the Plaintiffs having a freehold right of way, it has to be shewn that they have it, and if they have, it does not come within the Act, for it is not an estate. *Blackstone* (1) does not say that an incorporeal hereditament is an estate, and *Hewlins* v. *Shippam* (2) distinguishes between an easement and an estate. The statute 13 & 14 Vict. c. 21, s. 4, does not define "estate," though it defines "land." "Estate," therefore, must be taken in its ordinary legal meaning.

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(1) 1 C. M. & R. 117.

(2) Law Rep. 9 Q. B. 515.

(3) Kay, 550.

(4) 15 Q. B. D. 261; 16 Q. B. D. 778.

(5) 3 Y. & C. Ex. 707.

(6) 34 Beav. 105.

Napier Higgins, in reply.

COTTON, L.J.:—

This case comes before us on appeal and cross-appeal from a decision of Mr. Justice *North*. The Plaintiffs agreed to grant a lease for years to the Defendant, which was to include a right of way over land not belonging to the Plaintiffs. There are two questions, whether the Plaintiffs are bound to produce the deeds shewing their title to the right of way, and whether they are bound to produce those shewing their title to the land. The case turns on the 2nd section of the *Vendor and Purchaser Act*, 1874. The first section shortens the title which a purchaser is entitled to require on a "contract of sale of land." The 2nd section enacts that: "In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say (1) Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the free-

(1) Vol. ii. p. 35.

(2) 5 B. & C. 221.

hold." This sub-section is so worded as to get rid of any question whether an agreement to grant a lease comes within the description of "a contract of sale of land." Mr. *Upjohn* contends that this enactment was only intended to relieve vendors from the heavy expense to which, according to the old practice, they were put under an open contract, and does not affect the purchaser's right to discovery in an action where the vendor's title is denied. But in my opinion a lessor under the Act makes out a good title without shewing a title to the freehold. The question to be decided is whether, assuming the freehold title to be good, a good title is shewn to the leasehold interest, and the lessee cannot by a simple denial of the lessor's title acquire a right to discovery of documents which relate only to the title to the freehold.

But does that prevent a purchaser from raising *aliunde* the objection that the title to the freehold is bad? I think not, and, if he raises by way of objection to the title any distinct and tangible issue as to the goodness of the title, I think that he can call on the vendor for production of such documents in the vendor's possession as are relevant to that issue. It is urged that if the purchaser can obtain discovery of deeds by raising an issue that the title is bad, the object of the Act will be defeated. But that is not so, for if the vendor has no documents relevant to the issue raised, he can protect his deeds by swearing that they are not relevant. But has the Defendant raised any specific issue which the Court can try? His most specific allegation is: "Moreover the said premises are subject to divers restrictive covenants affecting the use and enjoyment thereof." If that allegation raised an issue in such a way that the Court could try it, I should say that the Plaintiffs ought to have an opportunity of making a further affidavit as to whether they have any documents relevant to that issue or not. But the allegation is general and appears to be a mere fishing one. If there had been an allegation that there was a covenant restraining the occupier from carrying on some particular business, the case would have stood differently. I am of opinion, therefore, that the cross-appeal fails.

As regards the original appeal from so much of Mr. Justice

North's decision as was against the Plaintiffs, if a contract is not a contract as to land it is not within the Act. But the statute 13 & 14 Vict. c. 21, s. 4, referred to by Lord Justice *Lindley*, defines "land" as including "hereditaments," and a right of way is certainly a hereditament. The second section shews that for the purposes of the Act a contract to grant a lease is a contract for sale, and the Act deals with all contracts for sale of land, so, even taking the stipulations as to the right of way as independent of the agreement to let the house and land, the contract comes within the Act, and the Plaintiffs are not bound to produce their title. I think, therefore, that the order for production must be discharged.

LINDLEY, L.J.:—

This is a suit by a vendor against a purchaser for specific performance of an agreement for a lease, which was to comprise a house and land, and a right of way over a drive. We know nothing about the right of way, whether it is appurtenant or in gross, nor do we know the precise terms of the contract, which has to be made out from a number of letters; but both parties have treated the effect of them as correctly summed up in the pleadings. The Act provides that it shall not be obligatory on the lessor to shew the title to the freehold. The lessee says: "You have a bad title, for the property is subject to restrictive covenants, and you must produce all documents in your possession which bear upon that point." The question is whether the Defendant can maintain this contention.

The question turns mainly upon the 2nd section of the *Vendor and Purchaser Act*, 1874. In construing that section we must attend to the object of the Act, and not put upon it a narrow construction which would defeat that object. The Act recites that "it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser," and by sect. 2, sub-s. 1, it enacts that (subject to any stipulations to the contrary in the contract), "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold." But for

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this provision a person who had agreed to grant a lease would be bound to make out and verify his title in the same way as if he had agreed to sell the fee. Can the purchaser successfully contend that this means only that the lessor is not bound to make out an abstract of his title, and that it does not exempt him from producing his deeds? I think that if we were to construe the section in that way we should defeat its main object. I think that the lessee is not entitled to see the lessor's deeds, and that on the main point Mr. Justice *North* was right.

As regards the right of way, I am not sure that I understand what view was taken by Mr. Justice *North*. He seems to have thought that a lease of a right of way was not a lease of land: but having regard to the statutory definition of "land," as used in Acts of Parliament, which is given by the statute 13 & 14 Vict. c. 21, s. 4, I think that no distinction can be taken between the right of way and the rest of the subject-matter of the demise.

Then Mr. *Upjohn* contends that the Defendant is at liberty to prove *aliunde* that the title is bad, in which I think he is right, and that he is entitled to obtain discovery in support of his case. The Defendant alleges that there are restrictive covenants which interfere with the enjoyment of the property. If he had alleged a specific case of that kind I think he would have been entitled to an affidavit as to documents in the possession of the lessor which are relevant to that case. But I think it would be unreasonable to oblige a lessor to search through all his title deeds to meet a vague allegation that there are restrictive covenants. If the Defendant had given any reason for alleging that there were restrictive covenants, I think the Plaintiffs would have had to meet the case so made; but the Defendant has not done so.

I am of opinion, therefore, that the Plaintiffs are not bound to produce any of their deeds.

LOPES, L.J.:—

I agree. I have felt some doubt whether the Act applies where production is called for, not under the rules which regulate the production of documents as between vendor and purchaser out of Court, but under the rules as to the right of a litigant to discovery.

I, however, do not dissent from the opinion of the other members of the Court.

Solicitors for Defendants: *Woodcock, Ryland, & Parker*, agents for *Vaughan & Hornby, Cardiff.*

Solicitors for Plaintiffs: *Watson, Sons, & Room*, agents for *L. Overstone Jones, Newport, Monmouthshire.*

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[1888 S. 237.]

Married Woman—Chose in Action—Title of Husband—General Probate of Will of Married Woman.

A woman, married before the *Married Women's Property Act*, 1882, who was entitled to *choses in action*, but had no separate property, nor any property of which she could dispose by will, made, without the assent of her husband, a will by which she appointed executors, and gave all her property away from her husband. After her death probate of her will, which, pursuant to the Rules of 1887, was in general form, was granted to one of the executors. The husband brought an action in the Chancery Division against the executor to recover the *choses in action*:—

Held, by *Kay*, J. (1), that the action must be dismissed, for that the Plaintiff suing the executor in the Chancery Division must treat the will as valid, in which case he had no title, and that his remedy was to apply to the Probate Division to revoke the probate and grant him administration of such estate of his wife as she could not dispose of by will:

Held, by the Court of Appeal, that the effect of the general probate was only to enable the executor to get in all the assets of the wife, whether she had power to dispose of them by will or not, and that it did not affect the beneficial title to them; that the husband was beneficially entitled to the *choses in action*, that the executor was a trustee of them for him, and that the husband was entitled to have them transferred to him by the executor, subject to the same deductions as they would have been subject to if the husband had taken out administration under the old practice.

THIS was an appeal from a judgment of Mr. Justice *Kay* (1).

The Plaintiff and his late wife intermarried in April, 1882. No settlement was made. The wife was then entitled to a legacy of £50, payable on her mother's death, and to a sum of £100 owing to her by one of her brothers. She died in July, 1887,

(1) 40 Ch. D. 165.

leaving a will, dated the 26th of July, 1886, whereby she appointed *Tranter* and *Curtis* executors, and devised and bequeathed to them upon the trusts therein mentioned, none of which were in favour of her husband, all the real and personal estate of which by virtue of any power of appointment or separate right of property or otherwise she should at her decease be competent to dispose by will.

The Plaintiff entered a caveat against the proof of this will, but afterwards withdrew it, and on the 14th of November, 1887, "administration of the personal estate of the said deceased was granted by the aforesaid Court to *F. J. Tranter*, one of the executors named in the said will, he having been first sworn well and faithfully to administer the same."

The wife, it appeared, had no testamentary power of appointment, and no separate estate, nor had her husband assented to her will.

The husband brought this action against *Tranter*, claiming that the Defendant should assign, transfer, and pay to the Plaintiff the £100 and interest, and assign and transfer to the Plaintiff the £50 legacy—an injunction to restrain the Defendant from otherwise dealing with those sums—and costs.

The Defendant, by his statement of defence, submitted that the £100 and £50 were assets of the wife, and as such liable to be applied in due course of administration in payment of her funeral and testamentary expenses and debts, and that if the Court held the Plaintiff entitled to the two sums, he would only be entitled to such balance (if any) of them as remained after payment of funeral and testamentary expenses and debts.

The Plaintiff, by his reply, stated that he had paid all his wife's debts and funeral expenses.

In answer to advertisements by the executor, a claim was sent in for necessaries supplied to the wife during her illness. It appeared that there had been an arrangement between the executors and the wife's mother that she should be buried at a particular place in the country, and that the extra expense should be paid by the mother. It appeared that the executors had in fact paid it.

Mr. Justice *Kay* dismissed the action with costs, on the ground that by suing the executor in the Chancery Division the Plaintiff admitted the validity of the will, which gave the property away from him, and that his remedy was to apply in the Probate Division to recall the probate and grant him administration.

The Plaintiff appealed.

Napier Higgins, Q.C., and *Barnard*, for the Appellant:—

Under the old procedure the probate of a married woman's will was limited to property of which she had a power of disposal, and then a grant of administration *cæterorum* was made to the husband; but under the Rules of March, 1887, which have the force of an Act of Parliament, probate is granted to the executor of a married woman in the ordinary form, whether she was or was not married before the *Married Women's Property Act*, 1882, without an inquiry whether there is any property over which she has a power of disposal: see *In the Goods of Price* (1). Consequently all her property, whether in possession or in action, is vested in her executor, and the husband cannot get administration granted to him in any form. But his equitable title to her *choses in action* remains; and the executor is a trustee for him. A husband has not only a right to be administrator of his wife, under which he can take her *choses in action*, but he has an equitable right to them which a Court of Equity will enforce, if his legal right cannot be enforced: *Humphrey* v. *Bullen* (2); *Elliot* v. *Collier* (3); *Squib* v. *Wyn* (4); *In re Lambert's Estate* (5). The Judge in the Court below thought that the Plaintiff ought to apply for revocation of the probate; but he could not succeed in such an application, for the executor is unquestionably entitled to probate under the present procedure of the Court of Probate.

Whitehorne, Q.C., and *Eustace Smith*, for the Defendant:—

The remedy of the Plaintiff is in the Probate Court. It is not necessary for him to apply for revocation of the probate; he may ask for a grant of administration, as he could before the new rule was made. The Probate Court has, since the passing of the

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(1) 12 P. D. 137.

(2) 1 Atk. 458.

(3) 3 Atk. 526.

(4) 1 P. Wms. 378.

(5) 39 Ch. D. 626.

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Judicature Acts, power to decide the question as to the property on which the will operates: *In the Goods of Tharp* (1). The new Rule does not give the executor of a married woman greater rights than he had before. It merely affects the mode of procedure. The executor cannot claim, and does not here claim, the *choses in action*. But he says that the husband can only take them subject to the wife's debts and funeral and testamentary expenses, and that he must obtain a grant of administration in order to get them. *In re Lambert's Estate* (2) related to separate estate; so it really does not bear on the point.

[COTTON, L.J.:—Have you any case deciding that, where general probate is granted to the executors of a married woman, they can only get in such property as she could dispose of by will?]

No. There is no case bearing on the point at all, except *In re Lambert's Estate*; but on principle we contend that it must be so Either the will vested the property in the executors, or it did not. If it did not, the action must fail, for the executors are not legal personal representatives as to these assets: *Betts* v. *Kimpton* (3). If it did, then the will must be held to carry to the executors property which the wife had no power to dispose of. If the executors take the property, they must hold it subject to the directions of the will—to hold otherwise would be to approbate and reprobate. If the Probate rule of 1887 has the effect contended for by the Appellant, a married woman has power to appoint an executor who can get in property of which she had no power to dispose. The grant of administration to the executor is made on the terms of his paying debts and legacies, and disposing of the residue according to law. The Plaintiff, therefore, in any event has claimed too much, for he is claiming that we should assign the property to him inconsistently with the terms on which we took it. We have first to pay expenses and debts.

Napier Higgins, in reply:—

We do not object to payment out of these assets of such debts as by law are payable out of a married woman's assets. This

(1) 3 P. D. 76.
(2) 39 Ch. D. 626.
(3) 2 B. & Ad. 273.

excludes obligations of her separate estate, and debts for necessaries, which, though incurred on her account, were not her debts, but her husband's.

COTTON, L.J.:—

This is an appeal from the judgment of Mr. Justice *Kay*, who decided that the Plaintiff, the executors of whose deceased wife are Defendants, was not entitled to any judgment or decree in his favour in this action, but that he must go to the Probate Court, and get the general probate, which has been granted to the Defendants, revoked, and get for himself a grant of administration in respect of any property which his wife could not dispose of by will. There has been a very learned and ingenious argument in the case, though the subject-matter is very small, the husband's claim being only to two *choses in action* of £100 and £50, which formed part of the wife's estate at the time of her death. She made a will naming two gentlemen her executors. The present practice of the Probate Court is not to grant probate of the will of a married woman to the executors in respect of such personal estate as she had power to dispose of by will, and to grant letters of administration *cæterorum* to the husband, which was the old practice, but to grant to the executors probate in general terms, and not to grant any administration to the husband. The Probate Court has in effect said, "The married woman had power to make a will which would pass separate estate and any estate that came to her after the passing of the *Married Women's Property Act*, 1882. So, without entering into the question whether there was property which she could not dispose of, and which would go to the husband, we grant general probate, giving the administration of all her personal estate to her executors." The husband claims from the executors the personal estate which the wife had no power to dispose of. Mr. Justice *Kay* says to him: "You cannot claim anything from the executors. They assert their title to the whole personal estate, and if you are desirous of asserting your claim to these *choses in action* you must go to the Probate Court, and get that Court to revoke the general probate, and grant limited probate to the executors and administration *cæterorum* to yourself." That

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was on the ground that the husband, after the death of his wife, could only claim her *choses in action* not reduced into possession on taking out administration to her, which he had not done, and that by bringing an action against the executors he admitted the title of the executors to all the estate of the wife which the probate purported to grant them. I think there is a fallacy in that. How was it that the husband could not get the *choses in action* of his deceased wife except by taking out administration? Because the *choses in action* not reduced into possession were assets of the wife to which a legal title could only be acquired by a grant of administration to her estate by the proper Court, and the husband, until he had obtained such grant, had no power to give a legal discharge for them. But as the wife had no power to dispose of them, the husband was beneficially entitled, there being a clause in the *Statute of Frauds* which prevented the *Statute of Distributions* giving any right to the next of kin as against the right of the husband which existed previously to the *Statute of Distributions*. Then how is the husband deprived of his wife's estate as against the executors? This is part of the wife's estate which (subject to the question I shall have to consider hereafter as to the right of the executors to get it in) was not disposed of by her will. It was undisposed of personal estate of the wife. If there had not been a husband surviving, the next of kin would have taken it under the *Statute of Distributions;* but there being a surviving husband, he is beneficially entitled to it. Under the old practice, if the husband died without having taken out administration to his wife, administration was granted to the next of kin, but the beneficial interest of the husband remained undivested, and devolved on his personal representatives. So here, the husband not having taken out administration, cannot sue the debtors for these *choses in action*, but he is beneficially entitled to them, and if the executors under the grant of probate are entitled to sue for them, he can sue the executors in respect of them, as being their *cestui que trust.*

It was argued most ingeniously by Mr. *Whitehorne* that the Plaintiff has no right here, but must go to the Probate Court, and Mr. Justice *Kay* has determined that he must, on the ground that the appointment of executors is a disposition to some extent of the property of the person who makes a will appointing executors—that here a married woman makes a will and appoints executors, and that the grant of general probate of that will is giving to her by the action of the Probate Court the power to dispose by will of this property—that the executors taking the property must dispose of it according to their oath—that is to say, in paying the debts and performing the other duties imposed on them by the will, that is, payment of the legacies and handing over the residue to the residuary legatees. This is a fallacy. The granting of probate to the executors does not recognise the right of the testatrix to dispose by will of the beneficial interest in all the property which the executors get in by virtue of the probate; it enables them to get in all the assets of the deceased, whether beneficially disposed of by the will or not, but does not alter the beneficial title to the property. The husband could not himself get in these *choses in action* without taking out administration; but if the right to get them in is granted by the Probate Court to another person, that person, when they are got in, holds them as trustee for the husband. In my opinion the grant of probate in the general form did not recognise the right of the testatrix to dispose beneficially of these *choses in action*, nor the right of the executors to dispose of them according to the directions of the will, but only recognised the executors as the persons who would represent the deceased and get in all her assets. In my opinion that ingenious argument by which Mr. Justice *Kay* seems to have been persuaded fails.

I am of opinion then that the Plaintiff is entitled to say, "I am beneficially entitled to these *choses in action* when got in by the executors," but he must take them subject to the same liabilities as if he had taken out administration. If he had taken out administration he would have had to pay the costs of administration and any debts there might be of his deceased wife. There might be debts existing which were contracted by her before the marriage, and those would be payable out of this property. It is said here that there were debts; but are they debts payable out of her assets? I am not dealing with liabilities contracted by her with reference to separate estate. Such liabilities are not her debts in the proper sense of the word—that is to say, they are not debts which must be paid by her administrator or executor out of her assets, but merely debts according to the peculiar doctrine of the Courts of Equity, which enables a married woman (though not capable by law of contracting) to contract with reference to her separate estate, so as to create liabilities payable out of it. Putting such liabilities aside, are there any debts of this married woman which are payable by her personal representative out of her assets? As far as the evidence goes, I think we ought to find that there are none. It is true that the husband if he had taken out administration might have had to pay something for his wife, for he is bound to pay for anything supplied to her in the way of proper provision for her, such as a nurse and medicine during her illness, and there are claims for matters of that kind; but those would have been his debts, not the debts of the wife, and he would not have paid them as her administrator. Then there is a question as to the funeral expenses. Of course the husband would be bound to bury his wife, but here on the evidence a portion of the funeral expenses has been paid by the husband; other portions, it is said, have been paid by the executors under the following circumstances. A husband is not bound to pay unreasonable expenses in burying his wife, and there was an arrangement made between her mother and the husband that he should pay a certain portion of the expenses, and that the increase of expense occasioned by her being buried in some particular place in the country should be borne by the mother. If this extra expense is what the executors paid, and I understand such to be the case, they must look to the mother to repay them. Therefore, I think we ought to declare that the Plaintiff is entitled to the disputed assets subject to payment of probate and testamentary expenses properly incurred. We must therefore discharge the order of Mr. Justice *Kay*, and we must order repayment to the Plaintiff of those costs which under that order have been paid by him to the executors. Then we think that as the Defendants, no doubt by the ingenuity of the arguments put by them before Mr. Justice *Kay*, persuaded him to make an order which we think erroneous, we cannot but give the Plaintiff the costs of the appeal for setting that right.

[His Lordship then considered the conduct of the parties up to the order of Mr. Justice *Kay*, and, considering that both were to blame, stated his conclusion to be that each party should bear his own costs below.]

LINDLEY, L.J. :—

This case unfortunately relates only to a small sum of money, but it has raised a discussion of considerable importance.

The action is brought by a husband against persons who have obtained probate in general form of the will of his wife. Part of the assets of the wife consists of *choses in action*, which have never been reduced into possession. The husband says, in substance, by his claim, hand those over to me. Mr. Justice *Kay* has taken the view that the husband has no *locus standi* at all in the Chancery Division, and that he cannot claim from the Defendants these assets of his wife unless he can get the probate to them revoked and get letters of administration granted to him of such parts of his wife's assets as she could not dispose of by will. It logically follows from that that the husband's action was dismissed with costs. The Plaintiff appeals from that decision, and having considered the case and heard the argument, it appears to me that Mr. Justice *Kay* has taken an erroneous view of the husband's position.

The rights of the husband require for their elucidation some inquiry into old law. The position of the husband will be found explained accurately, I believe, and clearly by Mr. Justice *Williams* in his work on Executors (1). He says: "It has been shewn, in a former part of this treatise, that the husband is entitled to the grant of administration of his wife's effects; and consequently, before the *Statute of Distributions*, he was entitled, as all administrators were, to the exclusive enjoyment of the residue." As the law stood before that statute, the administrator took the residue for his own benefit. The *Statute of Distributions* was passed altering that law as regards administrators generally, and there were some expressions in it which raised a doubt whether it had not altered the law as regards the husband. That doubt was set at rest by a clause introduced into the *Statute of Frauds* which enacted that neither the *Statute of Distributions* nor anything therein contained, "shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act." That left the husband where he was before. But that gave rise to another doubt, and that doubt was this. It is clear that since the *Statute of Frauds*, if the husband takes out administration, he can get the reversionary *choses in action* of the wife; but if he does not, the *Statute of Frauds* does not in terms apply. That doubt was raised and solved very early in the case of *Cart* v. *Rees*, which is stated in the following terms by the Lord Chancellor *Cowper* when giving judgment in *Squib* v. *Wyn* (1): "A wife died possessed of *choses in action*, and the husband survived, and died without taking out letters of administration to his wife, after which, the next of kin of the wife administered to her, and Lord *Parker* held, that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's *choses in action* being, by the *Statute of Distributions*, vested in the husband, as next of kin to the wife; and whereas there is a proviso in 29 Charles 2, saying, that the *Statute of Distributions* shall not extend to the estates of *feme coverts* that die intestate, but that their husbands may have administration of their personal estate, as before the making the Act, his Lordship said, this clause was made in favour of the husband, and not to his prejudice; so that it was intended by the Parliament, that the husband should be within the *Statute of Distributions*, so as to take the wife's *choses in action*, as to his benefit, but should not be within the same, as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason; for were the construction to be otherwise, the husband of the wife intestate, would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute."

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(1) 7th ed. vol. ii. p. 1488.

There are other cases which will be found in Mr. Justice *Williams*' book at page 1489, which are to the same effect, and there is now no doubt as regards the *choses in action* of the wife

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(1) 1 P. Wms. 378, 381.

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not reduced into possession during the coverture, that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity; but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in *Peere Williams*.

Now, pausing there for a moment, let us see how that affects the rights of the husband in this case. Until lately the practice in the Probate Court was to grant administration of the estates of married women in what may be called, in a popular sense, a double form. If a married woman left a will the executors would take out probate as to some assets, and the husband would take out administration as to the rest. After the passing of the *Married Women's Property Act* that was found to be extremely embarrassing in practice, which is obvious enough if we consider the effect on people who have to pay money to the wife's representatives. Supposing there were two legal personal representatives of the wife, and I owe money to the wife: to whom am I to pay? In order to get rid of that difficulty, and perhaps also for other reasons, the practice of the Probate Court was altered in 1887, and that rule which has been read, and which I will not read again, was made, and in conformity with that rule, when a woman dies leaving a will, the Probate Court grants probate of that will to the executors named in it, and it does not and will not, as I understand, grant partial probate to one person and letters of administration as to the rest of her property to another. But it is manifest that this alteration in the practice of the Probate Court cannot affect the rights of parties to property. It is mere matter of machinery. The Defendants have obtained general probate of the wife's will. What is the consequence of that? The consequence is that they are the persons and the only persons entitled in this country to get in the personal assets of the wife. It does not matter whether she can dispose of them by will or not. They are the only persons entitled in this country to get them in.

The next point is, what are the executors to do with these *choses in action* when they have got them in? If we bear in mind that this marriage took place before the *Married Women's Property Act* of 1882, the mode of dealing with these particular assets of the wife, I apprehend, is clear enough. They are assets of the wife; they belong to her husband. She cannot give them away without his consent. They belong to him on the authority of the cases to which I have already referred. It is, however, conceivable that at common law, without reference to separate estate, there might be debts of the wife properly payable out of those assets. That would be the case if she had contracted a debt before marriage which was unsatisfied, and such a debt would be payable out of her assets in the event of her dying before the husband. That is one instance, and there might be others. She might, for instance be a sole trader. Now, if any debts contracted by her and payable at law out of her assets exist, they would come out of her assets in priority to anything else. But it is clear that there were no such debts here, and that there is no use in having an inquiry on the subject. The existence of such debts is a mere theoretical possibility with which we need not concern ourselves. The result, therefore, is this, that subject to the payment of the testamentary and probate expenses, these assets belong to the husband. I think, therefore, that his action should not have been dismissed, but that he is entitled to a declaration that, subject as I have said, these assets belong to him. [His Lordship then stated his reasons for concurring with Lord Justice *Cotton* as to the costs.]

LOPES, L.J.:—

The form in which probate is granted does not in any way alter the rights of beneficiaries. When that is borne in mind, I do not think that this case is so difficult to deal with as it at first appears. I propose to say only very little with regard to it, and only very shortly to state what to my mind the result, in the circumstances of this case, is. It appears to me that the executors are the proper persons to get in these outstanding *choses in action* of the wife, and that the husband subsequently gets payment from the executors, subject to the same deductions as those *choses in action* would have been subjected to if the husband had taken out administration under the old practice. I agree with what has been said by the rest of the Court in all respects, and also I agree with what has been said with regard to the proper mode of dealing with the costs in this case.

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MINUTES OF ORDER:—Reverse the order. The Court being satisfied that there are no debts of the Plaintiff's wife payable out of her assets claimed by the Plaintiff, declare that, subject to the payment of the probate and testamentary expenses properly incurred by the Defendants, other than the costs of this action, the Plaintiff is entitled to those assets. Liberty to apply with respect to the probate and testamentary expenses and generally. The Defendant to repay the costs paid by the Plaintiff, and pay the costs of the appeal; each party to pay their own costs of the action.

Solicitors: *Collyer-Bristow, Russell, & Hill*, for *Wood & Awdry, Chippenham; Morse Hewitt & Farman*, for *A. W. Boodle, New Swindon.*

H. C. J.

KAY, J.
1890
Jan. 15, 16.

In re BATE.
BATE *v.* BATE.

[1889 B. 4895.]

Administration—Debts—Marshalling Assets—Pecuniary Legacies—Real Estate charged with Debts.

A testator directed that his debts should be paid as soon as after his decease as convenient, and made pecuniary and specific bequests, and specifically devised his real estate:—

Held, that the whole of the personal estate not specifically bequeathed, not excepting pecuniary legacies, must be applied in payment of debts before the real estate was resorted to.

Statement in *Seton* on Decrees (1) explained and corrected.

ADJOURNED SUMMONS.

The testator, *Charles Spence Bate*, by his will, dated the 30th of January, 1888, directed that all his just debts and funeral expenses should be paid as soon after his decease as convenient, and gave a sum of £60 a year to be paid to his second wife for her life out of the interest of certain specified securities, and directed the sum of £500 to be paid over to her "as trust money for her daughter," *V. Passmore*, "and £200 in trust for her son," *F. Passmore*, out of one of the specified securities, "for his and her education and establishment in life." He then gave to his daughter, *H. E. Bate*, a freehold house, his interest in certain leaseholds, and a sum of railway debenture stock, and to his son, *C. McGuire Bate*, another freehold house, and certain shares subject, as to the latter, to a trust during the life of the survivor of two sisters of the testator. He then bequeathed certain specified furniture to his wife, daughter, and son respectively, and to his son "all my book debts arising from my practice or what moneys may be derivable from my said practice that may not be wanted or required to pay off any of my just debts lawfully incurred by myself or wife." The testator concluded his will by making specific bequests of property of small value, and appointing his son and daughter executors of his will.

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(1) 4th Ed. pp. 989, 990.

By a codicil, dated the 29th of July, 1889, the testator gave a pecuniary legacy of £100 to his daughter, and varied the gift of the freehold house given by the will to his son by devising the house to his wife for life and after her death to the son. The testator revoked the gifts made by his will to his wife, and directed that sufficient of his estate should be set aside and invested by his executors to pay her the sum of £120 a year, the interest being reckoned at the rate of 3½ per cent. per annum, that she should enjoy the same for her life, and that after her death the same should be divided between her children, *V. Passmore* and *F. Passmore.* The testator did not in other respects alter his will.

The testator died on the 29th of July, 1889, seised and possessed of the freehold and leasehold properties mentioned in his will, but of no real estate other than such freeholds.

The summons was taken out by the executors, as Plaintiffs, against the widow and her two children, as Defendants, for the determination of various questions arising under the will and codicil, and upon the hearing of the summons his Lordship decided that the testator's debts and funeral expenses were charged on his real estate; that the bequest to the Plaintiff, *C. M. Bate,* of the testator's book debts and moneys derivable from his practice carried with it a sum of £950, the price agreed to be paid on the sale of the furniture and goodwill of the testator's business, but that the bequests of the book debts and the £950 were specific if and so far only as there should be a balance thereof remaining after such proportion of the testator's debts as were payable thereout had been so paid; and further, that the benefits given to the Defendants, *V.* and *F. Passmore,* by the codicil were given to them respectively in substitution for the benefits conferred on them by the will.

It appeared that, if the pecuniary legacy and annuity given by the codicil were fully paid and provided for, the general personal estate of the testator not specifically bequeathed and the book debts and sum of £950 would not be sufficient for the payment of his debts and funeral expenses, but that it would be necessary to resort to his other property, or some part thereof, and the question was accordingly argued as between the annuitant and other pecuniary legatees and the devisees of the real estate whether or not the real estate was primarily applicable to such payment.

Renshaw, Q.C., and *E. W. Stock*, for the Plaintiffs, submitted the question to the Court, and referred to *Seton* on Decrees (1), containing a statement as to the order in which assets are applied in payment of debts, from which it appeared that the general or residuary personalty not specifically bequeathed having been exhausted, real estate, devised charged with the payment of debts, was to be so applied in priority to general pecuniary legacies, and this statement was to be found in the text-books generally, *e.g.*, *Snell's* Principles of Equity (2); *Jarman* on Wills (3); *Theobald* on Wills (4). It appeared, however, to be erroneous. The only authority cited in *Seton* in support of it was *Sellon* v. *Watts* (5); but that case merely shewed that demonstrative legacies ranked as specific only so far as the funds appropriated to them by the testator were sufficient to meet them, and no further. Moreover, the statement in *Seton* was inconsistent with itself, inasmuch as general pecuniary legacies were part of the general personal estate not specifically bequeathed which, according to the statement, were to be first exhausted.

[KAY, J., referred to *Silk* v. *Prime* (6), and observed that the statement in the text-books might have been taken from the notes to that case, where, however, no authority was cited in reference to the point.]

MacSwinney, for the Defendants, referred to *Clifton* v. *Burt* (7), and contended that so much of the personal estate as was required to provide for the pecuniary bequests ought not to be resorted to until the real estate charged with debts had first been exhausted.

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(1) 4th Ed. pp. 989, 990.

(2) 2nd Ed. pp. 233, 234; 3rd Ed. p. 274.

(3) 4th Ed. vol. ii. p. 622.

(4) 3rd Ed. p. 572. See also *Williams* on Executors, 8th Ed. p. 1724, and cases there referred to.

(5) 9 W. R. 847.

(6) Wh. & Tud. L. C. 4th Ed. vol. ii. p. 111.

(7) 1 P. Wms. 678.

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KAY, J., after observing that the statement in *Seton* on Decrees appeared to have originated from some mistake, and arose, perhaps, from the consideration of some case in which a charge of debts on the real estate necessitated marshalling, held that in the present case the debts and funeral expenses were payable primarily out of the general personal estate not specifically bequeathed, and out of the book debts, and the sum of £950.

[The order as ultimately drawn up contained the following declaration:—That the testator's debts and funeral and testamentary expenses, and the costs hereinafter directed to be taxed, are payable primarily out of his general personal estate not specifically bequeathed, and out of his book debts and the said sum of £950; and if the said general personal estate not specifically bequeathed, and the said book debts, and the said sum of £950 shall be more than sufficient for the payment thereof, then they are to be paid thereout *pro rata*, and if the said general personal estate not specifically bequeathed, and the said book debts, and the said sum of £950 shall not be sufficient for the payment thereof in full, then the deficiency thereof is to be made up by contributions *pro rata* from all the specific legatees and devisees according to the respective values of the legacies and property respectively bequeathed and devised to them.]

Solicitors for Plaintiffs: *Coode, Kingdon, & Cotton*, agents for *Charles H. Benett, Devonport.*

Solicitors for Defendants: *Surr, Gribble, Bunton, & Gribble.*

C. C. M. D.

KAY, J.
1890
March 7.

In re MEYERSTEIN'S TRADE MARK.

Trade-Mark — Registration — "Satinine" — Descriptive Word — "Invented Word" — "Word having no reference to character or quality" — Patents, Designs and Trade Marks Act, 1888, *s.* 10 — *Patents, Designs and Trade Marks Act*, 1883, *s.* 64.

The word "*Satinine*," applicable to goods in Classes 47 and 48 in Schedule 3 to the Trade Marks Rules, 1883, comprising starch, blue, and other preparations for laundry purposes and perfumery:—

Held, to be a descriptive word, and therefore not registrable as "an invented word" or "a word having no reference to the character or quality of the goods," under sect. 10 of the *Patents, Designs and Trade Marks Act*, 1888, which is substituted for sect. 64 of the *Patents, Designs, and Trade Marks Act*, 1883.

THIS was a motion by Messrs. *Meyerstein & Co.*, general merchants, for an order upon the Comptroller-General of Patents to register the word "*Satinine*," in respect of the goods in Class 47 in the 3rd Schedule to the Trade Marks Rules, 1883, comprising, among other things, "starch, blue, and other preparations for laundry purposes," and in respect of the goods in Class 48 in the same schedule comprising "perfumery (including toilet articles, preparations for the teeth and hair, and perfumed soap)." The Applicants had used the word principally for starch and toilet-soap, in which they dealt, but which they did not themselves manufacture. They had applied in 1886 for the registration of the word under the *Patents, Designs and Trade Marks Act*, 1883, but the Comptroller preferred to reserve his decision until there had been further legislation as to what words were capable of registration.

In 1888 the *Patents, Designs, and Trade Marks Act* of that year was passed, sect. 10 of which, so far as it is material to the present case, is as follows:—

"10.—(1.) For sect. 64 of the principal Act"—the Act of 1883—"the following section shall be substituted, namely:—

"64.—(1.) For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars: . . . .

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"(*d*) An invented word, or invented words; or

"(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

Accordingly, in 1889, the Applicants applied for registration of the word under that Act, which the Comptroller refused on the ground that it was not a word capable of registration, and that there had already been registered, as part of a trade-mark, the words "*Satin Glaze*" for laundry starch.

The Applicants then served the Comptroller with notice of the present motion. They adduced evidence to shew that the word "*Satinine*" was not to be found in any dictionary.

Roger Wallace, for the Applicants:—

I submit that "*Satinine*" may be registered under the definitions (*d*) or (*e*) in the new section 64. Under the old section it was necessary that a word, to be registrable as a trade-mark, should be a "fancy word"; but now it is sufficient if the word is "an invented word," or "a word having no reference to the character or quality of the goods." In the present case, although the addition of "*ine*" to the word "*Satin*" may no doubt be a small invention, that fact is immaterial. The Act means that if a word is "invented," no matter in how small a degree, and has never been used before, it is capable of registration. Again, "*Satinine*" does not describe the "character or quality" of any of the articles in Clauses 47 or 48, for none of those articles impart, by the mere use of them alone, the qualities of satin, or a satin gloss.

Sir *R. E. Webster*, A.G., and *Ingle Joyce*, for the Comptroller, were not called upon.

KAY, J.:—

This is a word which describes the quality of the goods; and there is extremely little invention in the matter, for the only invention is putting at the end of a common word "satin"—which brings to every man's mind in a moment the notion of a glossy surface—the common conclusion "ine," which one finds in "saline," "saccharine," and numerous other English words. Certainly, if that is inventing a word, it is the easiest mode of invention one can possibly conceive. But I understand this Act of 1888 to be subject to the limitation which the decisions have put on the former Act—that you cannot possibly use any word, fancy word or otherwise, if it is a descriptive word. This word "*Satinine*" is a word descriptive of a glossy surface. Now, it is proposed to be applied to, amongst other things, starch and blue, and articles of that kind, used by washerwomen. Everybody knows that one effect of the use of starch is, that goods which are washed and starched, and then ironed or calendered, have a much more glossy surface than the same articles would have if ironed or calendered without being starched. That is common experience. We all know that; and it would be a recommendation of a particular starch that it would produce a more glossy surface than other starch. If you speak of or describe starch by a name which suggests to the mind at once the production of a glossy surface, you are using a descriptive word; and that is made all the more plain by what the Comptroller says. He states that one of his reasons for objecting to register this word was that within his own knowledge there had already been registered, as part of a trade-mark, the words "*Satin Glaze*" for laundry starch.

It seems to me plain that these Applicants are trying to obtain the registration of a word which would suggest to persons buying starch from them that it is starch which will conduce to the production of a very glossy surface. That is a description of the effect produced by the use of the article, and is, according to the decisions on the Act of 1883, a description of the article itself. The word is a descriptive word; and that is a very sufficient reason, in my opinion, for refusing, as the Comptroller has done, to register this word.

I refuse the application with costs.

Solicitors: *W. A. Crump & Son; Solicitor to the Board of Trade.*

G. I. F. C.

JONES *v.* SIMES.

[1888 J. 1641.]

CHITTY, J.
1890
Jan. 31;
Feb. 7.

Practice—Action for Mandatory Injunction and Damages—Death of sole Plaintiff—Continuance of Action by Executor and Devisee—3 & 4 *Will.* 4, c. 42, s. 2 [*Revised Ed. Statutes, vol. vii., p.* 409]—*Rules of Supreme Court*, 1883, *Order* XVII., *rr.* 1–4; *Order* XXXVI., *r.* 58.

The sole Plaintiff in an action for a mandatory injunction and damages for obstruction to the access of light to a freehold house, having died more than six months after the issue of the writ, *B.*, the executor and devisee, obtained the common order to carry on proceedings.

On motion to discharge this order for irregularity, on the ground that the cause of action did not continue, and that there was no transmission of interest to *B.*:—

Held, that though any action by *B.*, as executor, for injury to the Plaintiff's real estate might, under 3 & 4 Will. 4, c. 42, s. 2, be limited to the six months prior to the Plaintiff's death, still he could recover damages to this extent: that, with regard to the peculiar equitable remedy to have the obstruction to light removed, this was an equitable right subsisting in the Plaintiff at the time of her death, which, with the equitable remedy by mandatory injunction, devolved to *B.* as her devisee, and consequently that proceedings could properly be carried on by *B.*

Motion accordingly refused.

MOTION.

This was an application by the Defendant to discharge an order to carry on proceedings against him which had been obtained by the executor and devisee of the Plaintiff.

On the 3rd of December, the Plaintiff, *Jane Jones*, commenced this action against the Defendant, *Charles Edward Simes*, claiming a mandatory injunction and damages for an obstruction and interference with the access of light to the Plaintiff's freehold house, No. 68, *High Street, Worcester.*

On the 7th of February, 1889, the statement of claim was delivered, from which it appeared, that though the Defendant had then completed the buildings complained of, a correspondence had passed between the Plaintiff's solicitor and the Defendant in May, 1888, in which the Defendant wrote that he would do his "utmost to prevent any annoyance" to the Plaintiff, "or injury to her property." By her statement of claim the Plaintiff asked for: 1. An injunction to restrain the Defendant from allowing the said buildings any longer to remain so far as such buildings or any part of them obstructed, or diminished, or interfered with the access of light to the Plaintiff's windows, and that the Defendant might be ordered to pull down the said buildings to the extent aforesaid. 2. An injunction from erecting any other buildings which should in any manner obstruct or interfere with the access of light to the Plaintiff's house, and also an injunction to restrain the Defendant from allowing a certain wall erected by him upon a party-wall any longer to remain, and that the Defendant might be ordered to pull down the said wall. 3. Damages.

A statement of defence and reply were delivered in due course, and the action was entered for trial on the 19th of March, 1889.

On the 15th of October, 1889, the Plaintiff died, having made a will under which *Benjamin Jones* was her sole executor and devisee. This will was proved by *Benjamin Jones* on the 3rd of January, 1890.

On the 10th of January, 1890, the common order to carry on proceedings against the Defendant was obtained by *Benjamin Jones.*

The Defendant now moved to discharge this order for irregularity, on the ground that the cause of action did not survive or continue, and that there was no transmission of interest to the Plaintiff's executor and devisee.

The Defendant's counsel were offered leave to amend their statement of defence by pleading the statute 3 & 4 Will. 4, c. 42, s. 2, but this offer was declined.

Romer, Q.C., and *Maidlow*, for the Defendant:—

The action being in respect of a wrong committed by the Defendant against the original Plaintiff is, in effect, an action for tort, which dies with the Plaintiff, and the Court has no power under Order XVII., rule 4, to make an order that proceedings be carried on by the executor: *Bowker* v. *Evans* (1). Actions founded on wrong to the freehold do not survive to the executor: *Williams* on Executors (2), unless it be by virtue of the statute 3 & 4 Will. 4, c. 42, s. 2, and even then, as the original Plaintiff has died more than six months after the issue of the writ and commission of the wrong, no action can be maintained by her executor for an injunction and damages: *Kirk* v. *Todd* (1); *Phillips* v. *Homfray* (2).

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(1) 15 Q. B. D. 565.

(2) 7th Ed. p. 793.

As to the injunction, though *Benjamin Jones* might possibly maintain a fresh action in respect of injury done since the original Plaintiff's death, he cannot do so in respect of any injury done in her lifetime. As to damages, that is a totally different ground of action, which can only be brought under 3 & 4 Will. 4, c. 42, s. 2, and this right of action is limited to injury committed within six months of the testatrix's death. The injury was committed when the wall was first erected, more than six months ago: *Wordsworth* v. *Harley* (3); *Lord Oakley* v. *Kensington Canal Company* (4); the continuing the wall where it is, is not a new fact committed within the statute.

The present rules do not alter the law or give any right to continue proceedings where the cause of action dies, as here, with the Plaintiff: *Flinn* v. *Perkins* (5); *Twycross* v. *Grant* (6). The order giving *Benjamin Jones* leave to carry on proceedings is therefore wrong, and should be discharged.

Whitehorne, Q.C., and *Carleton Rea*, for the devisee and executor:—

The right of suit for injury to the freehold in a man's lifetime, survived to his heir or devisee: *Rolf's Case*, cited in *Penruddock's Case* (7).

The action is identical with the old suit in Chancery for an injunction, plus damages; it is not two actions, one for damages and another for an injunction, as contended by Defendant; being an action for injury to property the right of action survives: *Oakey* v. *Dalton* (8). Actions for tort could be revived where damage is caused to the personal estate of the deceased: *Hatchard* v. *Mège* (9). In an action of this kind the equitable

(1) 21 Ch. D. 484.
(2) 24 Ch. D. 439.
(3) 1 B. & Ad. 391.
(4) 5 B. & Ad. 138.
(5) 32 L. J. (Q.B.) 10.
(6) 4 C. P. D. 40.
(7) 5 Rep. 101a.
(8) 35 Ch. D. 700.
(9) 18 Q. B. D. 771.

remedy survived to the legal representative: *Garth* v. *Cotton* (1), where Lord *Hardwicke* treated it as clear. In real actions for relief as to injuries to property the right of action survived at Common Law, and under the *Common Law Procedure Act*, 1852, ss. 190, 194.

[CHITTY, J:—Have you looked into any of those cases on the old writ of right and those actions mentioned in 3 & 4 Will. 4, c. 27, s. 36? I think the real representative was always allowed to go on: *Vivian* v. *Champion* (2); *Ferrers* v. *Cherry* (3).]

In the old Chancery practice the "legal representative" could always revive, these words in Consolidated Order 32, rule 4, being considered as applying to the heir, devisee, or executor, according as the suit related to real or personal estate: *Price* v. *Berrington* (4).

There is no case reported in which any question has ever been raised or any doubt expressed as to the survivorship of a suit in equity relating to real estate.

As to damages, the Act 3 & 4 Will. 4, c. 42, s. 2, has no bearing on the point now before the Court. That Act only relates to actions of trespass and trespass on the case to be brought by executors after the testator's death, not to the continuance of an action commenced by the testator in his lifetime. Besides, the damages here were asked for, only as an addition to the substantial relief, by mandatory injunction.

In *Bowker* v. *Evans* (5), it was conceded that the action was one for tort, which did not survive. In *Kirk* v. *Todd* (6), the wrongdoer had died: here the wrongdoer is alive, and the wrong still continues. *Phillips* v. *Homfray* (7) was also a case of the death of the wrongdoer, and there was in that case no continuing wrong: and in *Flinn* v. *Perkins* (8) the action was for injury to the plaintiff, not to property. This is an attempt to get rid of an action to which there is no defence if it is continued. The application is wrong and should be dismissed.

(1) 1 Dick. 183, and p. 215 *et seq.*
(2) 2 Ld. Raym. 1125.
(3) 1 Eq. C. Ab. 3.
(4) 11 Beav. 90.
(5) 15 Q. B. D. 565.
(6) 21 Ch. D. 484.
(7) 24 Ch. D. 439.
(8) 32 L. J. (Q.B.) 10.

Romer, in reply:—

There is no distinct authority on this point.

It is laid down in *Williams* on Executors (1) and 1 *Wms. Saund.* (2) that unless it be under 3 & 4 Will. 4, c. 42, s. 2, that an executor cannot "have actions for diverting a watercourse, obstructing lights or other actions of the like kind: for such causes of action still die with the testator." For the purpose of considering the right of action, it is not necessary to consider whether the injury is a continuing one; according to the Plaintiff's contention, some one is going to recover damages for an obscuration of light more than six months prior to the testatrix's death; this cannot be right. Even if the Defendant had died, and the original Plaintiff were still alive, this action could not be maintained against his executor or heir.

[*Sheppard* v. *Gilmore* (3) was handed to the Judge by the Registrar, as an instance in which an action having been continued against a defendant's heiress-at-law and executor, an inquiry was added whether the deceased defendant had sustained any damages.]

CHITTY, J.:—

Certainly this case has been very fully argued, and if I thought it necessary to go through all the authorities on the subject before deciding it, I should probably take some time, in order to put my judgment into such shape as the citation of the authorities seemed to require; but notwithstanding the various arguments I have heard, I cannot consider this otherwise than a plain case. The point taken by the Defendant's counsel is, that the action is dead. I use the term "action," which is the modern one, though, when properly considered, this action is a common law action in respect of the damages, and a suit in Equity for a mandatory injunction, such as might have been maintained in former times in the Court of Chancery, and one which the old Courts of Common Law had no jurisdiction to deal with. The case made by the late Plaintiff on the correspondence, which is set out in the statement of claim, is one of conduct against the

(1) 7th Ed. p. 793.

(2) Page 245.

(3) W. N. 1887, p. 242.

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Defendant, and as possibly raising something in the nature of a contractual obligation on his part, which if she could sustain at the hearing, would have put her in the position of being entitled to have the obstruction complained of removed. There are two grounds of complaint, the first is that by the erection of a permanent building there will be an obscuration of the Plaintiff's light; and the second is building wrongfully on a party-wall of the Plaintiffs, and the mandatory injunction is asked in respect of both these wrongs; it also appears that the building which has caused the obstruction was not wholly erected when the writ was issued, but was finally completed after the issue of the writ. These points are material on the question of the mandatory injunction. Counsel for the Defendant are well aware of certain general rules which exist with regard to the granting of mandatory injunctions, and one cannot help seeing that if the devisee has to bring an action, he will have to do so considerably more than a year after the building was finally completed, and will or may not be in a position to rely on the letters which passed between the testatrix and the Defendant, in which case the Defendant will be in a better position to escape from the equitable remedy.

With reference to damages in a common law action of tort the devisee, of course, could not recover them; they would form part of the personal estate and belong to the executors. Formerly the damages in a common law action were only damages down to the date of the writ, but under the existing rules, Order XXXVI., rule 58, it is provided that in respect of any continuing cause of action, they shall be assessed down to the time of the assessment, so that the late Plaintiff could have recovered the common law damages down to the time of the assessment, and would not have been confined, as she would have been under the old practice, to damages down to the date of the writ; then the statute 3 & 4 Will. 4, c. 42, s. 2, has put the executor of the late Plaintiff clearly in the position of being entitled to bring an action in respect of this injury to the real estate of the testatrix, though such action must be brought within six months from the date of her death, and be limited as to damages to six months before. Consequently the continuing Plaintiff, as executor, could bring such an action, and, therefore, there is a right of action by virtue of that statute, and seeing that the late Plaintiff if alive could have recovered the damages from the period of her death, it is clear to my mind that the executor can recover these damages in this instance. Consequently I think there is a right on the part of the legal personal representative to continue, at least to the extent I have mentioned, the action so far as the common law action is concerned. I am not called on, and I do not express any opinion at the present moment—although I have a strong one—whether as executor he can recover more than the damages accruing within six months from the death; my impression is that he cannot, but I leave that to be discussed at the proper time; it is no ground for discharging the order, because the Defendant has been offered to be allowed to plead the statute, and that offer has been rejected.

I now come to the other part of this action, the claim for a mandatory injunction, and it appears to me that the peculiar remedy to have that building removed was an equitable right existing in the late Plaintiff at her death, which, though it did not pass to her executor—for the executor has no interest in the land—devolved or survived with the equitable remedy to her devisee, and I think the devisee is, in respect of the mandatory injunction, in the same position as his testatrix was. There is no rule of common law that applies, though possibly if I had had a little more time, a discovery might have been made, by searching through the old writs in real actions at common law—some of those mentioned in 3 & 4 Will. 4, c. 27, s. 36—of a case where there was a real action which the heir could have continued, but that would only be by analogy, it would not settle the point. I have inquired of the Registrars, and I have also inquired of other learned persons as to the practice, and I have some considerable knowledge and experience of my own of the present practice, and I find that no one has ever heard, in a case of this kind, of a devisee not being allowed to continue the action. One reason why it may be difficult to find at present any such case is, as has often been stated in similar cases, that it was never thought worth reporting. The fallacy of the Defendant's argument lies in comparing the right to the mandatory injunction to a common law action of tort; it even went so far as to say that if the wrongdoer, the present Defendant, had died and the original Plaintiff was still alive, that the action could not have been maintained against his executor or his heir; this, in my opinion, is an extravagant proposition. Order XVII., r. 3, provides that in case of the devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved, and I cannot find any reason for cutting down the effect of that rule, or for saying that it does not apply to such a case as the present. I therefore refuse the motion with costs, to be paid by the Defendant in any event. I have not gone through all the authorities which have been cited to me; I am quite surrounded by them, and I was quite prepared to go through a great many more, but I have considered them as they have been mentioned to me.

Solicitors: *Church, Rendell, & Co.*, agents for *Thomas Southall, Worcester; A. Hunt*, agent for *Miller Corbet, Kidderminster.*

W. C. D.

In re CRAWSHAY.
CRAWSHAY *v.* CRAWSHAY.

[1889 C. 3863.]

NORTH, J.
1890
Jan. 22, 23.

Power of Appointment—Exercise—Validity—Special Power—Fraud on Power—Appointment to Object of Power with directions for Settlement—Appointment of "Residue" to Object of Power—Absolute Appointment—Trust for Persons not Objects of Power.

Under a settlement, made in 1828, a testator had power to appoint by will to and among his children a sum of £35,000. By his will, made in 1865, he bequeathed £150,000 to his daughter *Jessy*, and directed that this legacy should be paid to four trustees named in the will, and should be held by them upon trust for her during her life, with remainder for her issue. The will then recited the power of appointment contained in the settlement, and by virtue of that power the testator appointed £10,000, part of the £35,000, to the same daughter; but his will was that the same should be paid to the trustees thereinbefore named with reference to the legacy of £150,000, and should be held by them upon the trusts thereinbefore declared thereof. The testator then appointed two sums of £10,000 and £7000 respectively in favour of two other daughters, and he appointed the residue of the £35,000 to his son *Robert* absolutely. And, in case he had exceeded his power in not appointing the £10,000 to his daughter *Jessy* unconditionally, but in directing the settlement thereof, and in case his said daughter, or her husband, or others having any right or power to object to the settlement thereof as aforesaid, should so object, or should not confirm such settlement, if required so to do, then he appointed that the said sum of £10,000 should go and belong to his son *Robert*, "but who will I am assured settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid so as thereby to carry out my wishes." After the testator's death the son *Robert* executed a declaration of trust of the £10,000 to carry out his father's wishes. There was no evidence (other than the will itself) of any bargain between the son and the testator that the former would settle the £10,000 :—

Held, that the appointment of the £10,000 in favour of the daughter *Jessy* was invalid; that the £10,000 did not pass to the son under the appointment of the residue to him; but that, under the last appointment to him, there being only an expression of the testator's wish, and no evidence of any bargain by the son that the fund should be settled, it passed to him absolutely, free from any obligation to settle it, and was, therefore, validly appointed.

In re Marsden's Trust (1) commented on and explained.

ORIGINATING SUMMONS by the trustees of a sum of £10,000, appointed by the will of *William Crawshay*, for the determination of the question, whether the appointment of that sum made by the will was a valid exercise of the power under which it purported to be made.

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(1) 4 Drew. 594.

By a voluntary settlement made on the 7th of August, 1828, a sum of £35,000, secured by a bond of the testator payable within six months after his death to the trustees of the deed, was vested in them, upon trust that they should pay, assign, and transfer the same unto, between, or amongst all and every or any such one or more of seven named children of the testator (three of whom were daughters respectively named *Amelia*, *Jessy*, and *Annette*) as the testator should by deed or will appoint, and, in default of appointment and subject thereto, in trust for the seven children, in equal shares as therein mentioned. The settlement contained a hotchpot clause.

In October, 1849, the daughter *Jessy* married her cousin *Alfred Crawshay*, and by the settlement, dated the 17th of October, 1849, made on her marriage, she assigned all her interest in the sum of £35,000 to the trustees of the settlement, to be held by them on the trusts therein declared.

By his will, dated the 21st of October, 1865, the testator bequeathed the sum of £150,000 Consols to his daughter *Jessy*, and he directed that this legacy to her should be paid or transferred to four persons named in the will as trustees, or the survivor of them, and that it should be held by them upon trust as to the income thereof for his daughter *Jessy* during her life, for her separate use, without power of anticipation, and after her death upon trust, as to the principal of the legacy, for her children or remoter issue as she should by deed or will appoint, and, in default of such appointment, and subject thereto, upon trust for her children as therein mentioned; and in default of issue the legacy was to be subject to the absolute appointment of the daughter by deed or will, and, in default of and subject to any such appointment, the same was to devolve and belong to the then next of kin of the daughter, exclusively of any husband. The testator gave a similar legacy, in the same way, to his daughter *Amelia*. The will then contained a recital that, by the settlement of August, 1828, the testator had power to appoint by his will the sum of £35,000 to or amongst any one or more of his children as therein mentioned. The will proceeded as follows: "Now therefore my will is, and, by virtue of the said power, and of every or any other power enabling me in that behalf, I appoint that the sum of £10,000, part of the said last-mentioned sum, shall go and belong to my daughter *Amelia*; the sum of £10,000, further part thereof, shall go and belong to my daughter *Jessy*; and the sum of £7000, further part thereof, shall go and belong to my daughter *Annette.* But my will is that as to the two first-mentioned sums of £10,000 and £10,000, the same shall be paid to the respective trustees hereinbefore named and appointed with reference to the legacies hereinbefore bequeathed to them my said two daughters respectively, and be held upon the trusts and for the intents and purposes hereinbefore declared of or concerning those legacies." The testator then directed that the sum of £7000 appointed to his daughter *Annette* should be paid to trustees to be named by his executors, and be settled and held upon the trusts therein mentioned. The will continued: "And, as to the residue of the said sum of £35,000, I appoint and declare that the same shall go and belong to my son *Robert T. Crawshay*, his executors, administrators, and assigns, absolutely. And, in case I have exceeded my power in not appointing the said sums of £10,000, £10,000, and £7000, unconditionally, but in directing the settlement thereof respectively as aforesaid, and in case my said daughters *Amelia*, *Jessy*, and *Annette* respectively, or their respective husbands, or others having any right or power to object to the settlement thereof as aforesaid, shall so object, or shall not confirm such settlement thereof, if required so to do, then I appoint that the said sums of £10,000, £10,000, and £7000 respectively shall also go and belong to my said son *Robert T. Crawshay* absolutely, but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes."

On the 7th of November, 1867, *Robert T. Crawshay* executed a declaration of trust of the £10,000 appointed to the daughter *Jessy*, to carry out the testator's wishes.

Jessy Crawshay survived her husband, and by her will, dated the 29th of January, 1885, she, professedly in exercise of a power of appointment conferred on her by the will of the testator with regard to the legacy of £150,000 and the sum of £10,000 appointed by his will to her as aforesaid, appointed various sums to her children (one of whom was *Jessy Sandeman*) and their issue; and the testatrix declared that any child or grandchild of hers who might object to or try to defeat the exercise of the powers of appointment and other the provisions and intentions of her will, should forfeit all benefits conferred on him or her by the will, and that every appointment or bequest made to him or her, or for his or her benefit, should for this purpose be considered as having been made to her daughter *Jessy Sandeman.* The testatrix died on the 17th of July, 1889.

The Defendants to the summons were, the trustees of the settlement of the 17th of October, 1849; Mrs. *Sandeman*; the other children of Mrs. *Alfred Crawshay*; the trustees of their settlements; and their children.

The summons asked for the determination of the questions —(1) Whether the trustees of the settlement of 1849 were entitled to have the £10,000 appointed to *Jessy Sandeman* paid or transferred to them; (2) whether the Plaintiffs held that sum upon the trusts declared by the will of *William Crawshay,* as well as the declaration of trust dated the 7th of November, 1867, executed by *Robert T. Crawshay.*

Bramwell Davis, and *Reginald Winslow,* for the Plaintiffs.

Brice, Q.C., and *R. F. Norton,* for *Jessy Sandeman* :—

There is not an absolute appointment to *Jessy Crawshay,* so that the appointed fund would pass to the trustees of her marriage settlement. The whole of the clause must be read together. The only appointment to her is by means of the direction to settle the fund, and that is bad because it goes beyond the power. The absolute appointment to *Robert T. Crawshay,* therefore, takes effect. The addition of the words, "who will, I am assured, settle the same voluntarily," does not invalidate the appointment. Those words do not indicate any bargain with *Robert* for the settlement of the fund, and there is no evidence of any such bargain or secret trust. The words only point to a belief entertained by the testator, and, in the absence of any bargain with *Robert*, the absolute appointment to him is good: *Blacket* v. *Lamb* (1).

[They were stopped on this point.]

If, however, the appointment to *Jessy* and the appointment to *Robert* are both bad, the £10,000 goes to *Robert* under the appointment of the residue of the £35,000 to him. The testator has shewn an intention to appoint the whole of the £35,000: *Freme* v. *Clement* (2); *Carter* v. *Taggart* (3); *Champney* v. *Davy* (4); *In re Turner's Settled Estates* (5); *In re Harries' Trust* (6). The older cases, such as *Easum* v. *Appleford* (7), must now be treated as overruled.

Napier Higgins, Q.C., and *P. S. Stokes*, for other Defendants in the same interest.

Everitt, Q.C., and *J. W. Cunliffe*, for the trustees of *Jessy Crawshay's* marriage settlement of the 17th of October, 1849:—

The attempt to impose an obligation (even a moral obligation) on the daughter, or to put pressure on her in order to compel her to settle the fund, is void: *Wallgrave* v. *Tebbs* (8); *Tee* v. *Ferris* (9); *Moss* v. *Cooper* (10); *Topham* v. *Duke of Portland* (11); *Rowbotham* v. *Dunnett* (12).

[NORTH, J., referred to *Lomax* v. *Ripley* (13) and *Jones* v. *Badley* (14).]

In cases relating to mortmain the illegality is the creation of statute, and, in order to avoid a gift of land in form absolute, it is necessary to prove an enforceable trust for a charity, a trust binding on the conscience of the donee. But the doctrine of fraudulent appointments is an equitable doctrine, and does not depend on statute. The donee of a special power of appointment

(1) 14 Beav. 482.
(2) 18 Ch. D. 499.
(3) 16 Sim. 423.
(4) 11 Ch. D. 949.
(5) 28 Ch. D. 205.
(6) Joh. 199, 205.
(7) 10 Sim. 274.
(8) 2 K. & J. 313.
(9) Ibid. 357.
(10) 1 J. & H. 352.
(11) Law Rep. 5 Ch. 40.
(12) 8 Ch. D. 430.
(13) 3 Sm. & Giff. 48.
(14) Law Rep. 3 Ch. 362.

has a discretionary trust. Where the motive and object of an appointment to an object of the power is not avowed, as it is here, to be really to benefit persons outside the power, it must be shewn to be so by evidence. But here the object is avowed, and all that is done is mere machinery to carry out a fraud on the power. The daughter takes absolutely, and the attempt to compel her to make a settlement fails: *Woolridge* v. *Woolridge* (1); *Sadler* v. *Pratt* (2); *Churchill* v. *Churchill* (3); *In re Marsden's Trust* (4).

The £10,000 does not pass to *Robert* under the gift of residue: *Page* v. *Leapingwell* (5); *Petre* v. *Petre* (6); *Wright* v. *Weston* (7); *Wilson* v. *Kenrick* (8); *Morgan* v. *Gronow* (9); *Scholfield* v. *Spooner* (10). *Booth* v. *Alington* (11) is distinguishable. *In re Harries' Trust* (12) is an authority in our favour. In *Petre* v. *Petre* the power was a general one; and so it was in *Freme* v. *Clement.* In *Holyland* v. *Lewin* (13); *Freme* v. *Clement* (14) was disapproved.

E. Wilkinson, for the trustees of Mrs. *Sandeman's* settlement.

Brice, in reply:—

In re Marsden's Trust (15) was a very special and peculiar case, as was pointed out by Lord Justice *Baggallay,* in delivering the judgment of the Court of Appeal in *Roach* v. *Trood* (16). The circumstances of the present case are very different. In *Churchill* v. *Churchill* and in *Sadler* v. *Pratt,* it was held that an absolute appointment could not be cut down or fettered with a condition, and that the appointees took absolutely.

Freme v. *Clement* and *Holyland* v. *Lewin* relate to the effect of sects. 25 and 33 of the *Wills Act* with regard to lapsed appointments.

(1) Joh. 63, 69.
(2) 5 Sim. 632.
(3) Law Rep. 5 Eq. 44.
(4) 4 Drew. 594, 599.
(5) 18 Ves. 463.
(6) 14 Beav. 197.
(7) 26 Beav. 429.
(8) 31 Ch. D. 658, 661.
(9) Law Rep. 16 Eq. 1.
(10) 26 Ch. D. 94.
(11) 6 D. M. & G. 613.
(12) Joh. 199, 205.
(13) 26 Ch. D. 266, 272.
(14) 18 Ch. D. 499.
(15) 4 Drew. 594.
(16) 3 Ch. D. 429.

R. F. Norton (having been stopped in the opening), was allowed also to reply:—

The true rule with regard to an absolute appointment, coupled with a direction to settle, is laid down in *Pryor* v. *Pryor* (1), and by Lord *Cranworth* in *Duke of Portland* v. *Topham* (2).

[He also referred to *Wright* v. *Goff* (3); *Goldsmid* v. *Goldsmid* (4); *Birley* v. *Birley* (5).]

Robert took the £10,000 either under the appointment of the residue, which includes the subject of an invalid appointment or under the absolute appointment to him, and then the fund is bound by his declaration of trust.

North, J. (after reading the provisions of the will above stated, down to the absolute appointment of the residue of the £35,000 to the son, *R. T. Crawshay*, and observing that the £35,000 was a sum which the testator had bound himself to pay upon his death, and that, therefore, it was not a fund requiring conversion or capable of either increase or reduction, but that it was a definite sum which would be payable in cash at the time of the appointor's death, that being the date at which the appointment would take effect, continued):—

The testator directs that the £10,000, which he in the first instance appoints to his daughter *Jessy* absolutely, shall be paid to four special trustees, whom he had appointed in a previous part of the will with reference to a legacy of £150,000 which he had bequeathed to his daughter *Jessy*, to be held by them upon the trusts and for the intents and purposes which he had already declared of or concerning that legacy. Therefore, the £10,000 is to be paid by the executors to the special trustees, and not to *Jessy* at all, and, when it is paid to the special trustees, it is to be held by them upon the same trusts as those declared of the £150,000, which include a larger class than the settlement of 1828, and powers which are not comprised in it. *Jessy* is not to receive the money and then to proceed to settle it, but the money which the testator gives to *Jessy* he gives to her by means of this direction, that it is to be paid to trustees named by him and to be held by them upon the trusts, thereinbefore declared of the legacy, under which *Jessy* takes only a life interest. Then the testator, after appointing £10,000 and £7000 in a similar way to two other daughters, appoints that the residue of the £35,000 shall go and belong to his son *Robert T. Crawshay*, absolutely.

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(1) 2 D. J. & S. 205.

(2) 11 H. L. C. 32, 55.

(3) 22 Beav. 207.

(4) 2 Hare, 187.

(5) 25 Beav. 299.

Now, stopping there, we have the gift to *Jessy* followed by a direction, that what is given to her is to be paid to trustees, who are to hold it upon certain trusts under which her interest is only a limited one, and, if the will had stopped there, it might have been said that, as under the first words of gift, *Jessy* took absolutely, subject to the trusts afterwards created, if those trusts failed the original gift remained untouched, as in *Lassence* v. *Tierney* (1); *Carver* v. *Bowles* (2); and a great many other similar cases. But the will does not stop there, for the testator goes on to say, "And in case I have exceeded my power in not appointing" *Jessy's* £10,000 "unconditionally, but in directing the settlement thereof as aforesaid." That shews clearly that he thought that, in doing what he had previously done, he might possibly be held by construction of law to have exceeded his power. In what way? Because he had not given the £10,000 to the daughter absolutely, free from any condition. This shews that, in his view at any rate, the only gift to her was as part of the arrangement, and for the purpose of the arrangement, for effecting a settlement of the £10,000, and it shews also that, considering there was some doubt as to his power to do what he had done, he thought it necessary to provide what was to be done in case the law should prevent what he had already attempted to do from taking effect, as he hoped that it would. Then he says: "In case I have exceeded my power in not appointing the fund unconditionally" —in other words—"If what I have done cannot take effect, and the £10,000 is undisposed of, and in case my daughters *Amelia*, *Jessy*, and *Annette*, respectively, or their respective husbands, or others having any right or power to object to the settlement thereof as aforesaid, shall so object, or shall not confirm such settlement thereof, if required so to do," which comes to this:

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(1) 1 Mac. & G. 551.

(2) 2 Russ. & My. 304.

"If I have exceeded my power, and if, by reason of an objection on the part of any person entitled to object, that which I have attempted to do cannot be confirmed, then something else is to be done." It is quite clear that there cannot even now be any confirmation by all the persons who would be interested in the fund in default of appointment of the disposition by way of settlement previously made. It is true that *Jessy Crawshay* did all she could to confirm it, but unluckily she had not an absolute interest. In my opinion the testator was dealing with failure by reason of some invalidity in the previous appointment, and the absence of confirmation by all persons whose consent would be necessary to make the appointment valid. He contemplates the possibility that he might not be able to procure a confirmation from every person interested in disputing it, and he goes on to deal with the fund in a different way. If that is so, he says that *Jessy's* £10,000 (as I will call it for brevity) "shall also go and belong to my son *Robert T. Crawshay* absolutely." That is clearly a disposition of the £10,000 which he had already appointed in a way which he now treats as possibly invalid. Now *Robert T. Crawshay* was an object of the power, and, so far as I have yet gone, the gift to him is clearly good. It is suggested that it is bad by reason of that which follows, which I will consider presently. But, pausing at this point, there is a clear gift to him of the £10,000 in an event which the testator contemplated as possible, and which has actually happened, and, in my opinion, he takes the £10,000 under that gift, and not under the gift of the residue of the £35,000. I do not think it necessary to consider whether, supposing there had been no express gift to *Robert T. Crawshay* in the event which has happened, of the £10,000 settled upon *Jessy*, that sum would, in case the prior dispositions thereof had failed, have passed to *Robert* under the gift to him of the residue of the £35,000. But, in my opinion, he cannot, in the event which has happened, take *Jessy's* £10,000 under the appointment of the residue, because it is clear that the testator did not consider that in that event it would go to him under the gift of residue, for in that particular event the testator gives the £10,000 to *Robert* in express words. I hold that the £10,000 cannot go to *Robert* as part of the residue of the £35,000, there being another express gift of it to him, which is inconsistent with its passing under the gift of residue.

But then arises the question whether *Robert* can take the £10,000 at all, by reason of the words which follow. The direction is, first, that the £10,000 is to go and belong to *Robert* absolutely, and then follow these words, "but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." That is entirely inconsistent with the notion that under the first gift to *Jessy* she had taken an absolute interest in the £10,000. I think it is quite clear that she did not.

Then the only question is, whether the £10,000 thus given to *Robert* is so given to him for the purpose of his applying it for the benefit of persons who are not objects of the power that the gift must fail. The phrase, "who will, I am assured, settle the same voluntarily," is capable of different meanings. It may mean, "I feel certain, not because he has ever said anything to me, or I to him on the subject; but I know that is what he will do with it." That is one natural and simple meaning of the words. But the words "I am assured" may also mean, "as he assures me," or "as my solicitor tells me." If the words mean "as he assures me," that is, if they shew that there was a bargain between the two, that, though this fund was given to *Robert* absolutely with a statement that he might settle it voluntarily if he chose to do so, he had really bound himself to settle it according to the testator's wishes, then, in my opinion, the appointment would be void. But if, on the other hand, the fund is really given, as it purports to be, to *Robert* absolutely, not subject to any trust, but that he might do what he liked with it, and if the word "voluntarily" is truly used, then, if he does settle it as the testator says he should like him to do, and as he endeavoured to do himself, that would be an entirely voluntary act on *Robert's* part, and the appointment to him would be valid. There is no evidence of any conversation, or arrangement, or bargain, or even of any understanding between the father and son, or that the son had any knowledge that there was any such provision in the will, before the will was opened after the testator's death and the contents made known to the family; and, even if the son did know of the provisions in the will before the testator's death, yet, unless it was made known to him under circumstances which shewed that he had accepted a trust, and had bound himself to carry out his father's wishes, I do not think his knowledge would make the gift invalid. In my opinion, the real meaning of the words is, not that *Robert* was bound to settle the fund, but that it was given to him absolutely, and that the testator, having shewn what he wished done by trying to do it himself, and having on this hypothesis failed in doing it, left it entirely to the son whether he would or would not settle the fund upon the daughter. In point of fact, the son has settled it; but that is immaterial, if it was absolutely free to him to deal with the fund as he pleased.

A number of cases have been cited, and one or two of them seem to me material. In *Pryor* v. *Pryor* (1) the law was no doubt correctly laid down. Lord Justice *Knight Bruce* there said (2): "The donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is, that the appointment would not have been made but for the bargain, then the appointment is bad. The question is, to which of these two classes of cases the present case belongs."

That is precisely the question in the present case. The conclusion to which I come upon the will is that which I have already stated. There is no evidence whatever, and I have to get as best I can at the intention of the parties as it is shewn upon the face of the will. I confess that *In re Marsden's Trust* (3) did appear to me at first to create some little difficulty; but I observe that even in that case Vice-Chancellor *Kindersley* said (4): "Unless it can be shewn that the trustee having the discretion" (meaning for this purpose the person having power

(1) 2 D. J. & S. 205.
(2) Ibid. 210.
(3) 4 Drew. 594.
(4) Ibid. 599.

to appoint) "exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though suspicion is ground for jealous investigation—if it be mere suspicion, and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it. But if on the other hand it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly or for a purpose which defeats instead of carrying into effect the purpose of the trust, then the Court will not permit such an exercise of the power to prevail."

Now in the present case there is no evidence to introduce any element even of suspicion, or, indeed, anything which is not to be found in the will itself. I have no materials for coming to the conclusion that the will is not honestly framed and expressed for the purpose of giving effect to it, and there is nothing behind it for me to consider.

In *In re Marsden's Trust* (1), the facts were very peculiar, and it has been treated by other Judges as a somewhat exceptional case, and I think it is so for this reason. There a mother, who had under a settlement a power of appointment among children, desired to make a provision for the father out of the settled fund, his circumstances being such that she thought he ought to be assisted in that way. This intention was openly discussed. The father was not an object of the power, and therefore he could not take any part of the settled fund under an appointment. A solicitor was consulted, and he advised that an appointment could not be made to the father, and that project thereupon dropped. An arrangement was then made between the father and the mother that the whole fund should be appointed by the mother to the eldest child, a daughter, who was at that time an infant, and who did not require any immediate provision to be made for her, with this object, that, when the mother was dead, the father might tell the daughter that the whole fund had been appointed to her, under an arrangement between her father and mother, with the object of enabling the daughter to provide for her father. One cannot help seeing what an influence would have been brought to bear on the daughter when the father told her that, and that it would be practically impossible that she should resist doing that which it was the intention of her father and mother that she should do, and the doing of which under the influence thus exercised upon her would be an entire perversion and misapplication of the fund—taking it away from the persons in whose favour it ought to have been appointed, and giving it to a stranger. If an appointment of that kind is obtained by means of undue influence, of course it cannot stand, and that is shewn by the later cases which have been referred to. That, I think, is the true explanation of *In re Marsden's Trust* (1), and I do not think that case is in any way inconsistent with the law as stated in *Pryor* v. *Pryor* (2). The same conclusion is, I think, to be drawn from *Roach* v. *Trood* (3).

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(1) 4 Drew. 594.

I come to the conclusion that an absolute appointment to *Jessy* was never made; that the only gift to her was by means of the direction that the trustees of the other settled fund were to have the sum appointed to her and upon the same trusts; and that such a settlement was beyond the power of the testator. Under these circumstances, it appears to me that it was open to him to appoint the fund absolutely and unconditionally to *Robert*, and I think that is what he did, so that the words which were relied upon as shewing that it was really appointed to *Robert* conditionally do not lead to that result, and do not, therefore, operate to make the prior appointment to him bad.

The order as drawn up declared that the Plaintiffs held the £10,000 upon the trusts of the declaration of trust executed by *Robert T. Crawshay* on the 7th of November, 1867.

Solicitors: *A. R. & H. Steele; Lawrence, Graham, & Long; Cunliffes & Davenport; Bell, Brodrick, & Gray.*

(1) 4 Drew. 594.
(2) 2 D. J. & S. 205.
(3) 3 Ch. D. 429.

W. L. C.

NORTH, J.

1890

Feb. 1.

In re GATLING GUN, LIMITED.

Company—Reduction of Capital—Confirmation by Court—Reduction of some Shares only—Jurisdiction—Discretion—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 9, 11 [*Revised Ed. Statutes, vol. xv., pp.* 624, 625]—*Companies Act,* 1877 (40 *&* 41 *Vict. c.* 26), *s.* 3 [*Revised Ed. Statutes, vol. xviii., p.* 367].

Under the *Companies Acts,* 1867 and 1877, the Court has power to sanction a special resolution for the reduction of some only of the shares of a company.

In re Union Plate Glass Company (1) dissented from.

PETITION by the company, asking for the confirmation by the Court of a special resolution for the reduction of the capital of the company.

The company was formed with a nominal capital of £800,000, divided into 45,000 ordinary shares of £10 each, and 35,000 preference shares of £10 each. Of the ordinary shares 37,590 had been issued, and of the preference shares 28,559 had been issued. All the shares issued had been paid up in full. A large number of each class of shares had been originally issued in pursuance of a duly registered contract, as fully paid up, to the vendor to the company of certain patents, or his nominees. In August, 1889, the then holders of 16,325 of the ordinary shares, and of 12,697 of the preference shares, thus issued originally to the vendor or his nominees, executed a deed, by which they respectively surrendered those shares to the company, to the intent that the same should be cancelled for the benefit of the company, and so that no dividend, interest, or profit of any kind should at any future time be payable upon or in respect of the shares so surrendered, and so that such shares should be cancelled as though the same had never existed or been issued.

This surrender was the result of negotiations for an abatement from the purchase-money agreed to be paid by the company for the patents, on the ground that it exceeded their real value by the sum of £290,220, the nominal value of the 29,022 shares thus surrendered. To the extent of this sum of £290,220 the capital of the company was not represented by available assets.

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(1) 42 Ch. D. 513.

By a special resolution of the company, passed on the 12th of November, 1889, and confirmed on the 3rd of December, 1889, it was resolved to reduce the capital to £371,270, divided into 21,265 ordinary shares of £10 each, and 15,862 preference shares of £10 each, and that the reduction should be effected by cancelling the 7410 ordinary shares, and the 6441 preference shares which had not been issued, and by accepting the surrender of, and cancelling, the shares comprised in the deed of August, 1889.

Farwell, for the company:—

The only question is, whether the Court has power under the Acts to sanction a reduction of some only of the shares of a company, the other shares not being reduced. In *In re Union Plate Glass Company* (1), Mr. Justice *Kay* held that there is no power under the Act to do this, but that all the shares must be proportionately reduced. That case, however, is distinguishable from the present, for there one class of shares was to be reduced, against the will of the holders, by the vote of a majority of the shareholders. In the present case the shares which are to be cancelled are to be cancelled with the consent of the holders. In *In re Barrow Hæmatite Steel Company* (2) your Lordship expressed an opinion that the Act gives power to reduce some shares, without reducing the others, though, as you held in *In re Quebrada Railway Land and Copper Company* (3), the Court ought not to confirm such a reduction, unless full information of the effect of what is proposed has been given to the shareholders before the passing of the special resolution.

NORTH, J.:—

I think I ought to confirm this resolution. In *In re Union Plate Glass Company*, Mr. Justice *Kay* said (4): "I cannot find the smallest intimation that the Act gives a company power to reduce certain of its shares without reducing the others." I, however, cannot find the smallest intimation that the Act pre-

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(1) 42 Ch. D. 513.
(2) 39 Ch. D. 582.
(3) 40 Ch. D. 363.
(4) 42 Ch. D. 516.

NORTH, J. 1890 *In re* GATLING GUN, LIMITED.

vents a company from reducing some of its shares without reducing the others. I need not say more than that I adhere to the opinion which I expressed in *In re Barrow Hæmatite Steel Company* (1). In my opinion, if a proper case is made out for confirming a resolution for reducing some only of the shares of a company, there is nothing in the Act which deprives the Court of the power of confirming it. That which it is proposed to do in the present case appears to me reasonable, and I, therefore, confirm the resolution.

Solicitor: *E. F. B. Harston.*

W. L. C.

NORTH, J. 1890 *Feb.* 8.

In re WORMALD.
FRANK *v.* MUZEEN.

[1889 W. 3710.]

Will—Construction—Forfeiture—Gift of Life Interest to Married Woman for her Separate Use without power of Anticipation—Gift over "on her anticipating" the Income—Mortgage of Life Interest.

A testator gave a fund to trustees, upon trust to pay the income to his sister "for her separate use, free from the debts and control of any husband, without power of anticipation, and for and during the term of her natural life, and from and after her decease or on her anticipating" the income, or any part thereof, the principal was to be on trust for her children equally. At the time of the testator's death the sister was married. The husband was still living. The sister executed a deed assigning her life interest by way of mortgage:—

Held, that "anticipating" could not be read as meaning "attempting to anticipate," and that, as, by reason of the restraint on anticipation during coverture, the assignment of the life interest was wholly inoperative, there had been no forfeiture.

ORIGINATING SUMMONS by the surviving trustee of the will of *G. F. Wormald*, deceased, to determine the question whether, in the events which had happened, a gift made by the testator of the income of his residuary estate to his sister *Mary Elizabeth Muzeen* had or had not determined.

The testator by his will dated the 21st of March, 1874, gave his real estate and the residue of his personal estate to trustees, upon trust, out of the rents and income thereof, to pay an annuity of £300 to his wife during her life, and to pay the remainder of such rents and income to his sister *Mary Elizabeth Wormald* "for her separate use, free from the debts and control of any husband, without power of anticipation, and for and during the term of her natural life, and from and after her decease, or on her anticipating the same rents and income or any part thereof," upon trust as to the said trust estate for all the children of his said sister equally, as tenants in common, with a gift over in case there should be no such child who should attain twenty-one.

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(1) 39 Ch. D. 594, 595.

The testator died on the 24th of March, 1874. His widow died in July, 1881.

At the date of his death his sister *Mary Elizabeth* was the wife of *William Muzeen*, whom she had married in 1867. At the date of the issuing of the summons *William Muzeen* was still living. Mrs. *Muzeen* had had only one child, a son, *G. E. B. Muzeen*, who had attained twenty-one, and she and that son were the Defendants to the summons. On the 3rd of June, 1889, Mrs. *Muzeen* executed an assignment of her life interest under the will to *J. M. Richardson*, by way of mortgage to secure a sum of £40 advanced by him to her.

The Defendant *G. E. B. Muzeen* had also mortgaged his interest under the will.

H. J. Hood, for the Plaintiff.

Arnold White, for Mrs. *Muzeen*:—

There has been no anticipation of Mrs. *Muzeen's* life interest. She has no power to anticipate it, and there is no provision for forfeiture upon an attempt to anticipate.

Dunham, for the son and his mortgagee:—

The restraint on anticipation is annexed to the separate use. Mrs. *Muzeen* cannot anticipate her life interest, and, therefore, the forfeiture clause will have no meaning unless "anticipating" is read "attempting to anticipate."

[NORTH, J.:—The restraint on anticipation applies to any coverture, and only to coverture. If she became discovert she could then anticipate her life interest. The restraint would revive on her marrying again.]

The forfeiture clause applies only while the restraint on anticipation is in existence, that is, only while the separate use exists.

NORTH, J.:—

I cannot adopt the view that "anticipate" means "attempt to anticipate." The trust is for Mrs. *Muzeen*, "for her separate use, free from the debts and control of any husband," without power of anticipation, and during her life, and from and after her death, "or on her anticipating the same," the estate is to be on trust for her children. Has she anticipated her life interest? No. She could not do so, because at the date of the testator's death she was, and she has ever since been, a married woman. The husband to whom she was married at the date of the testator's death is still living. It is impossible, therefore, that she could anticipate her life interest. It is, however, suggested that the words "on her anticipating the same" mean "on her attempting to anticipate." Clauses providing for a forfeiture upon an attempt to anticipate, as well as upon an actual anticipation, are very familiar to us; the difference between the two things is well understood. I cannot add to this will a clause which is not to be found in it, viz., that the estate is to go to the children, if Mrs. *Muzeen* attempts to anticipate her income without succeeding in doing so. It is the clear intention of the testator that she is to have the income during her life; but he does not intend that anyone else shall have it. If she anticipates it, he intends that the capital shall go over to her children. There is no reason why I should give to the words a meaning which I am satisfied the testator never intended them to bear. The assignment by Mrs. *Muzeen* of her life interest was entirely inoperative, and did not in any way affect her life interest, and there has been no forfeiture.

Solicitors: *Collyer-Bristow & Co.*, agents for *J. D. Whitehead, Pickering; Morse & Simpson*, agents for *Jackson, Richardson, & Ridge, Malton.*

W. L. C.

METCALFE *v.* METCALFE.

KEKEWICH, J.

1889

Nov. 22, 23; Dec. 4.

[1889 M. 929.]

Will—Forfeiture Clause—Absolute Gift—Bankruptcy—Annulment—Reversions—Time of Annulment.

A testator by his will gave personal estate to his children as tenants in common. He then gave to trustees real estate and personal estate on trust to pay the rents and profits to his children as tenants in common during their lives, with benefit of survivorship. He then gave certain reversions to the trustees on similar trusts. He then provided that if by act or operation of law any interests given by his will in trust for his children should be aliened whereby the same should vest in any other person, then his trustees should apply the interest so aliened to and among the other persons entitled to the same by survivorship, as in the case of the death of the person so aliening.

One of his children was at the time of his death a bankrupt. Within a year afterwards she became entitled to property which when sold was sufficient to pay her debts and the costs, but the bankruptcy was not annulled until more than two years after that:—

Held, that as to the absolute gift of a share of personal estate the clause of forfeiture was repugnant and had no effect:—

Held, that with respect to estates in remainder not come into possession before the annulment, personal enjoyment by the legatee was not interfered with, and the forfeiture did not take effect:—

Held, that, in ascertaining for this purpose when the annulment took place, the time when the bankrupt came into legal possession of property enough to pay the debts and costs, and not the time of the actual annulment, must be taken.

The question of forfeiture is not affected by sect. 81 of the *Bankruptcy Act of* 1869, corresponding with sect. 35 of the Act of 1883.

THOMAS METCALFE by his will dated the 10th of May, 1864, bequeathed certain money and other personalty, one third thereof to his wife, and the remaining two thirds equally between his children living at his decease as tenants in common. The testator then devised and bequeathed unto trustees all the real and leasehold estates of which he might die possessed, and all his residuary estate under the will of one *Jacob Metcalfe*, and all other his estate and effects not thereinbefore disposed of, upon trust to pay to or permit his wife to receive one third part of the net rents and profits during her life or during so long as she should continue his widow, and to pay the remaining two thirds equally between all his children who should be living at his decease for and during their respective lives and the lives and life of the survivors and survivor of them. And he declared that on the death or second marriage of his wife his said children should share equally the whole of the said rents and profits during their lives and during the lives and life of the survivors and survivor of them. And the testator then directed that his trustees should stand possessed of certain funds to which he was entitled, subject to certain annuities under the will of *Jacob Metcalfe*, upon trust to invest the same in leaseholds as therein mentioned, and to pay the net rents and profits to his wife and children in a similar manner to that as to the other rents and profits. He then directed that, subject thereto, his trustees should stand possessed of all other moneys which should come to their hands as part of the residuary estate of *Jacob Metcalfe* upon trusts for his wife and children, similar to those previously declared. The testator then directed that after the decease of the last survivor of his wife and children the trustees should stand possessed of the whole of his estates upon trust for his grandchildren, as therein mentioned. And the will contained the following clause: "Provided always that if by any act or default or by operation of law the part or share parts or shares or the whole of the said rents and profits or any other sums of money or interests limited or bequeathed by this my will in trust for my said wife and children or child, grandchildren or grandchild, or either of them, shall be aliened, charged, or disposed of, either in part or as to the whole of the said several and respective shares and interests, whereby the same respectively would but for this provision vest in or become payable to some other person or persons other than my said wife, children or child, grandchildren or grandchild, or some of them, then my said trustees or trustee shall upon such act or default, or upon such operation of law as aforesaid, pay or apply the share or shares, interest or interests, so aliened, charged, or disposed of, or attempted to be so dealt with, as and in manner aforesaid to and among the others or other of the persons, or the persons who would have been entitled to the same by survivorship, in remainder, or otherwise, under the aforesaid trusts, as in the case of the death or deaths of the person or persons so aliening, charging, or disposing of his, her, or their respective shares and interests, or attempting the same, as in manner aforesaid."

By a codicil dated 4th of February, 1881, he appointed his wife, one of his daughters, and *J. E. Lawford* executors and trustees of his will.

The testator died on the 7th of February, 1884, leaving five children him surviving, one of whom, *George Arthur Metcalfe*, died on the 17th of January, 1885.

The Plaintiff, *Georgina Metcalfe*, another of the children, had been adjudicated bankrupt on the 16th of March, 1882.

The proceedings in bankruptcy were admitted as evidence, and from them it appeared that *Georgina Metcalfe* was, at the time of the testator's death, under another will entitled to a reversion which was sold but had apparently not produced enough to pay her creditors and the costs. On the death of *G. A. Metcalfe* on the 17th of January, 1885, *Georgina Metcalfe* became entitled to another reversion under the same will. The trustee in bankruptcy had however died in 1885, and this occasioned delay, so that this second reversion was not sold till January, 1887. That sale produced enough to satisfy the creditors and to pay the costs, and the bankruptcy was annulled on the 10th of June, 1887.

The executors and trustees had not paid to the Plaintiff any part of the testator's estate or any of the rents and profits, considering that they were forfeited by the bankruptcy. No part of the reversionary interests belonging to the testator had come into possession since the annulment of the bankruptcy.

Georgina Metcalfe brought this action against the executors and the other children claiming administration of the estate of *Thomas Metcalfe*.

This was the trial of the action, the only question being as to the effect of the bankruptcy and the annulment with respect to the forfeiture.

Warmington, Q.C., and *T. B. Napier*, for the Plaintiff:—

We contend first that the clause of forfeiture does not apply at all, and if it does, then only as to a part of the bequests. As

KEKEWICH, J. 1889 METCALFE v. METCALFE.

to the first bequest the clause does not apply, as it relates only to the devises and bequests in trust. Moreover, such a provision will not defeat an absolute gift, as it is repugnant: *Co. Litt.* (1); *Holmes* v. *Godson* (2); *Bradley* v. *Peixoto* (3); *In re Rosher* (4); *In re Dugdale* (5).

In the next place the forfeiture clause can only apply to a future bankruptcy, not to one before the death of the testator: *Trappes* v. *Meredith* (6), and *Gibbons* v. *Gibbons* (7), were different. But the provision as to forfeiture does not come into operation under the circumstances. The clear object of the testator was that the legatee and no one else should have the enjoyment of the property, and the clause is only to take effect if that enjoyment is defeated. If therefore by the bequest or by any other means the creditors and the costs are paid, the legatee has the surplus: *White* v. *Chitty* (8); *Bailey* v. *Johnson* (9); *Lloyd* v. *Lloyd* (10); *Ancona* v. *Waddell* (11). It was by no fault of the bankrupt that the estate was not revested in her in good time, and what ought to have been done must be taken to have been done. If the estate within a reasonable time after the death of the testator is sufficient to satisfy all claims, the forfeiture is not incurred. The cases to the contrary are cases of composition with creditors, and do not apply. It was clear that within a year after the death of the testator there would be enough to pay everything, and the delay cannot make any difference. The bankrupt was entitled to have the bankruptcy annulled at that time.

[KEKEWICH, J., referred to *Samuel* v. *Samuel* (12).]

In *Robertson* v. *Richardson* (13), the distinction seems not to have been taken. At all events as to the future reversionary interests there can be no forfeiture: *In re Parnham's Trusts* (14). The annulment wipes out all transactions except those mentioned in s. 81 of the *Bankruptcy Act* of 1869, which was then in force. An annulment is not like a discharge, and leaves the bankrupt as if he had never been so.

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(1) Page 231 a.
(2) 8 D. M. & G. 152.
(3) 3 Ves. 324.
(4) 26 Ch. D. 801.
(5) 38 Ch. D. 176.
(6) Law Rep. 7 Ch. 248.
(7) 6 App. Cas. 471.
(8) Law Rep. 1 Eq. 372.
(9) Ibid. 7 Ex. 263.
(10) Ibid. 2 Eq. 722.
(11) 10 Ch. D. 157.
(12) 12 Ch. D. 152.
(13) 30 Ch. D. 623.
(14) 46 L. J. (Ch.) 80.

Neville, Q.C., and *Gaselee*, for the Defendants:—

This clause defeats the whole which had been given by the will. Conditions are often held void: *Bradley* v. *Peixoto* (1), but no doubt there may be an effective forfeiture with a limitation over: *Brandon* v. *Robinson* (2). The legatee must perform the condition before she gets the legacy: *In re Stringer's Estate* (3). These interests were never actually vested in the legatee. The cases cited on the other side are all disposed of by *Ancona* v. *Waddell* (4). The proper time to take is that of distribution, and whether that is immediately or at the end of the year does not signify in this case, as the annulment did not take place till long after. There can be no distinction between that which has fallen in and that which has not, as the testator must have intended to include everything: *Dorsett* v. *Dorsett* (5). At the end of the year the trustees must pay somebody, and could not keep the money on the chance of the bankruptcy being annulled, nor could they retain the rents. Everything passed to the assignee in bankruptcy. As to reverter that is equivalent to re-conveyance, and here the bankrupt has never had anything to re-convey: *Markwick* v. *Hardingham* (6); *In re Parnham's Trusts* (7). The rents accrued and accruing cannot be separated.

Warmington, in reply:—

The cases cited on the other side were of insolvency or composition. Perhaps before the 17th of January, 1885, there was not enough to pay everything, but after that there was, and the bankruptcy must be taken to be then annulled.

[KEKEWICH, J., expressed his opinion that there was nothing in the arguments that the clause only applied to what was given to trustees, and that only a future bankruptcy was meant.]

(1) Tud. L. C. (Real Property), 3rd Ed. 968.
(2) 18 Ves. 429.
(3) 6 Ch. D. 1.
(4) 10 Ch. D. 157.
(5) 30 Beav. 256.
(6) 15 Ch. D. 339.
(7) Law Rep. 13 Eq. 413.

It is not true that if the money had been paid to the trustee in bankruptcy, it would not have come to the Plaintiff after her debts were paid.

1889. Dec. 4. KEKEWICH, J.:—

Judgment was reserved in this case for the sake of an opportunity of looking more carefully into some of the many authorities cited. That the object of the clause in question is to secure personal enjoyment by the legatee, or rather to provide against the benefits given to him by the will being enjoyed otherwise than by him personally, is common ground to Plaintiff and Defendants, and is in accordance with all decisions touching the point of construction; but the general principle admitted, there is some difficulty in applying it to particular circumstances. That difficulty does not arise in this case from the language of the clause, which lends itself readily to such a construction as I have mentioned, nor yet so much from the rest of the will as from the dates and other facts which have been brought into consideration. I dismissed at the trial the suggestion that some of the benefits given to the Plaintiff were not limited or bequeathed "in trust," within the meaning of the clause, and also the argument that the words "shall be" point only to a future bankruptcy or other alienation, and do not cover the actual event of a bankruptcy, which occurred in the testator's lifetime. As thus read the words would not be consistent with the general principle above stated, and I do not think that either grammatical construction or authority constrains me in that direction. Indeed, the authorities are the other way: *Trappes* v. *Meredith* (1); *Gibbons* v. *Gibbons* (2).

The other points argued deserve somewhat more elaborate treatment. It is conceded that the forfeiture clause must be read distributively—that is, as if repeated after each gift in favour of the Plaintiff, and made applicable to that gift alone. Thus read, the proviso is incorporated into the gift, which takes a conditional or restricted form, so that what but for it would be a simple bequest now becomes a bequest determinable on the happening of any one of the events specified. The operation of the proviso on two different sets of gifts is disputed on the ground, as regards one, that such operation is legally impossible, and as regards the other, that no specified event has occurred. There are unquestionably gifts to the Plaintiff of an absolute character, gifts, that is, which, if concerned with land, would create an estate in fee, and the Plaintiff says that to put the forfeiture clause in operation as regards these would be to defeat the original gift by a condition repugnant to it, and therefore void. You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personalty. In favour of the will, which must be read and construed as a whole, you can allow such a proviso to defeat any particular estate, not as operating to take away that which has already been given, but as restricting the quantity of the original gift; but an estate in fee, or its equivalent, an absolute gift of personalty, does not admit of such treatment. There is no occasion to refer to the cases establishing these propositions, many of which were cited in argument. The subject was fully treated in *Holmes* v. *Godson* (1), where mention of earlier authorities will be found. As regards, therefore, these gifts, which, according to the terms of the will, independently of the forfeiture clause, vested absolutely, whether in possession or in remainder, on the testator's death, I hold them to be unaffected by the forfeiture clause, not because the language of the clause is inapplicable to them, but because the defeasance is repugnant to the original gifts, and therefore void.

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(1) Law Rep. 7 Ch. 248.

(2) 6 App. Cas. 471.

In considering the point last treated I have grouped together, as governed by the same rule, estates in possession and in remainder, but when one comes to consider a property given otherwise than absolutely, as for life, a distinction must be taken between these two classes. The distinction is justified by the principle of construction above mentioned, and is the logical outcome of it. The intention of the testator that the legatee shall partake of his bounty provided only that personal enjoyment be secured, would be defeated if when an alienation, whether by

(1) 8 D. M. & G. 152.

act of the party or operation of law, is cancelled before enjoyment becomes possible, enjoyment were held to be prohibited by the forfeiture clause. It has been held in many cases, to some of which I shall presently refer, that if a bankruptcy, which, if continuing, would have brought a forfeiture clause into operation, has been annulled before any money becomes payable to the legatee, the clause does not come into operation, because the personal enjoyment does not, in the events which have happened, require to be secured, and this rule is directly applicable to reversionary interests whether taking effect as remainders or as executory gifts. This is consonant to the decision of the late Master of the Rolls in *In re Parnham's Trusts* (1), about which it is to be observed that though he there simply follows other decisions, it was recognised by himself in *Samuel* v. *Samuel* (2) as based on principle. It is true, as urged on behalf of the Defendants, that here the bankruptcy was subsisting at the date of the testator's death, and therefore whatever had been given, whether in possession or in remainder or contingently to the legatee, was immediately transferred to the trustee in bankruptcy, and might have been realized by him for the benefit of the creditors, and it is argued that therefore personal enjoyment was without doubt interfered with so as to bring the forfeiture clause into operation. To yield to this argument would, I think, be inconsistent with the principle on which I have relied. Personal enjoyment points not to vesting in law, notwithstanding that the term "vest" is used as it is in this will, but to enjoyment; in fact, that enjoyment which, if not interfered with would be accompanied by receipt or payment; and a gift which, according to the terms of the will, cannot yet be thus enjoyed, remains for the time in suspense. The moment for determining whether the forfeiture clause is applicable to it or not is the moment when receipt or payment becomes possible in fact.

The only other question is one of some practical importance, respecting which the authorities are, I take leave to say, somewhat perplexing. It is this. What amounts to a cesser of alienation so as to exclude the operation of the forfeiture clause? I have used the word "alienation" as extending to assignments by the act of the party as well as by operation of law, for the same rule must apply to both; but in this case as in others we have general alienation by bankruptcy, and it will be convenient to deal with that only. I have no doubt that the period of distribution—that is, the time when payment to the legatee becomes due in law—is the time when the inquiry whether a legacy is to be paid to the legatee or to his trustee in bankruptcy must be answered. So thought the Master of the Rolls in *Samuel* v. *Samuel*, and Mr. Justice *Pearson* in *Robertson* v. *Richardson* (1), and I conceive the decision of Vice-Chancellor *Hall* in *Ancona* v. *Waddell* (2) to be in nowise inconsistent. The postponement of payment by some accident, as the difficulty of proving some devolution of title, or the lunacy or death or absence from this country of a trustee, or any other like cause, ought not, I think, to affect the result, and this I understand to have been in substance held by the Judges quoted, as well as by others whose decisions were before them. There may occur difficulties in applying this general rule to some class of cases, but they will be difficulties occasioned by the peculiar circumstances of those cases, not disturbing the rule itself. In this instance the testator died on the 7th of February, 1884, and such gifts as took effect in possession at his death became payable then, or at least at the expiration of one year from that date. It matters not which date is taken for the purposes of this case, as the bankruptcy subsisted for more than two years after the death. It is said, however, on behalf of the Plaintiff that, although from accidental circumstances, and particularly the failure of the trustee in bankruptcy, the proceedings in bankruptcy were unduly prolonged, yet the estate was solvent, and there was enough to pay the creditors in full, so that whatever was coming to the legatee under the will was really her own, notwithstanding that it could not have been paid without the concurrence of the trustee in bankruptcy. If that had been substantially true, I should certainly have been disposed to hold that the forfeiture clause did not come into operation. Applying, again, the principle which must be applied to find a solution of all these questions, I think that the merely nominal interposition of a trustee in bank-

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(1) 46 L. J. (Ch.) 80.

(2) 12 Ch. D. 152.

(1) 30 Ch. D. 623.

(2) 10 Ch. D. 157.

ruptcy could not be held to defeat personal enjoyment. If, that is, money were payable to a trustee in bankruptcy under such circumstances that he thereupon, without the happening of any event other than some declaratory or other order claimable by the legatee, became a trustee of that money for the legatee, I should certainly as at present advised hold that the money would be personally enjoyed by the legatee just as much as if he had authorized an attorney to receive it on his behalf. In other words, annulment of bankruptcy need not have been formally made so as to prevent the operation of the forfeiture clause, provided there exist the circumstances which entitle the legatee to claim annulment as a matter of right; and that, although some account may have to be taken, or some payments to creditors or others have to be made, before annulment can be perfected. That, I apprehend, to be the meaning of the Vice-Chancellor's decision in *Ancona* v. *Waddell* (1), nor do I understand Mr. Justice *Pearson* to have dissented from that view in *Robertson* v. *Richardson* (2), which he distinguished in its circumstances from that case as well as from *White* v. *Chitty* (3). I cannot, however, give the Plaintiff the benefit of any such ruling here. The bankruptcy was not annulled until the 10th of June, 1887, and the assets sufficient to procure that result were not realized until February, 1887. I hold, therefore, that any interests to which the Plaintiff was entitled under the will at the date of the testator's death, and which according to my ruling on other points fall within the operation of the forfeiture clause, were not excluded from that operation by the annulment of her bankruptcy.

A point was raised on the 81st section of the *Bankruptcy Act*, 1869 (the Act applying to this particular case), the language of which is for this purpose the same as the 2nd sub-section of sect. 35 of the *Bankruptcy Act*, 1883. It is provided that the property of a bankrupt shall on annulment vest in such person as the Court may appoint, or, in default of such appointment, revert to the debtor for all his estate and interest therein. It was said that the effect of this provision is in some way to conflict with such a forfeiture clause as is found in this will, and to

(1) 10 Ch. D. 157.
(2) 30 Ch. D. 623.
(3) Law Rep. 1 Eq. 372.

give back to the debtor, as his own, all that he would have been entitled to had there never been any bankruptcy. Such a construction would, to my mind, be altogether unreasonable, and it is not justified by the language of the Act. I think that that clause was intended to operate only as between the debtor on the one hand and the trustee or other persons claiming title under the bankruptcy on the other, and it confers on the debtor, as from the date of annulment, a good title to his property, so that he may convey or give a good discharge for the same without the concurrence of the trustee in bankruptcy, but it was not intended to affect the title of other persons claiming independently as under such a forfeiture clause as we have here.

MINUTES:—Declare that the Plaintiff has incurred a forfeiture of her life interest in the share immediately divisible by the testator's will bequeathed to her of the rents and profits of the real and leasehold estates of or to which the testator died possessed or entitled. And has also incurred a forfeiture of her life interest in the accrued share in such rents and profits to which she would have been entitled on the death of *G. A. Metcalfe* if the forfeiture clause in the will were not applicable thereto, but that save and except as aforesaid the forfeiture clause has not and will not by reason of the Plaintiff's bankruptcy now annulled become applicable to any devises or bequests to or in trust for the Plaintiff contained in the will. Consequent directions.

Solicitors for Plaintiff: *Harper & Battcock.*
Solicitors for Defendants: *Thompson & Groom.*

C. M.

CRAWFORD *v.* FORSHAW.

KEKEWICH, J.
1890
Jan. 11.

Power—Executor renouncing.

A testator appointed three persons executors. He then gave the residue of his estate to certain charitable institutions or others, as "my executors herein named may select, to be divided in such proportions as they may approve of." Two of the executors proved the will. The third executor renounced probate:—

Held, that, nevertheless, the third executor was entitled to take part in the selection of the charities, and in the distribution of the residue.

Keates v. *Burton* (1) distinguished.

THE will of *J. K. Mainwaring*, after giving certain other legacies, gave "To my executors herein named the sum of fifty pounds each for the trouble they may have in the execution of this my will, and also to mark my friendship and regard for them." He then appointed *Joseph D. Crawford, John Forshaw,* and *William Jones,* executors of his will. He then gave legacies of £500 and £150 to each of eight hospitals, and proceeded: "The residue of my estate I leave and bequeath to the above-named charitable institutions or such others or additional as my executors herein named may select to be divided in such proportions as they may approve of." The testator died in March, 1888, and his will was proved by *Joseph D. Crawford* and *William Jones*; *John Forshaw* having renounced probate.

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(1) 14 Ves. 434.

On the 1st of January, 1890, an originating summons was taken out at Liverpool by the two executors who had proved, for the determination of the question whether *John Forshaw* was entitled to take part in the selection of the charitable institutions among which the residuary estate was to be distributed, and in approving of the proportions in which such residuary estate was to be divided among such institutions.

The Court had in another suit respecting this will decided that *John Forshaw* was entitled to the legacy of £50 although he had not proved.

The summons now came before the Court.

Neville, Q.C., and *Crawford,* for the Plaintiffs:—

None but the executors who have proved can have anything to do with the will or the residue. The enactment of 20 & 21 Vict. c. 77, s. 79, is important. The executors have to administer; and division of the residue is part of the administration. *Williams* on Executors (1). The persons who are to distribute are described as executors: *Keates* v. *Burton* (2). A man cannot be an executor and not an executor. The residue is not bequeathed to them, and they take nothing except as executors.

Warmington, Q.C., and *P. O. Lawrence,* for *John Forshaw*:—

The words "executors herein named" is equivalent to giving the names of these three persons. It is clear that the testator had a regard for them personally, and had trust in them. An

(1) 8th Ed. pt. i. bk. 3, c. 6, s. 2, p. 290.

(2) 14 Ves. 434.

executor who does not prove may exercise a power: *Sugden* on Powers (1). This is a power not dependent on but added to the office of executor. It does not appear that the executors who did not prove were parties in *Keates* v. *Burton* (2), and if they were not, it is no decision as against them.

Neville, in reply.

KEKEWICH, J.:—

If I thought that *Keates* v. *Burton* really decided the question now submitted to me for decision, of course I should follow it without cavil, indeed without expressing any opinion of my own; because not only is it a decision of great age, but it is a decision of a very learned Judge, and I should be bound to follow it. But it does not seem to me to have decided the point. It is quite true that the words have unusual similarity. I mean that there is more similarity than one generally finds in a case of one will cited on the consideration of another. But it seems to me that the point really considered and decided was not the point which I have to consider and decide here. As I have already mentioned, the arguments are reported, and one gladly turns to the arguments to see what the Court was called upon to decide. It is stated (3): "The question is, whether this legacy of £2000 is, under the circumstances and in the events that have happened, an absolute interest in *Christie*." That was what the Master of the Rolls considered in the interval between the hearing of the case and his judgment, and what he purported to decide. No doubt, in deciding that point, he states that the power could not be exercised, that the executors had renounced the only character in which they could exercise it, and therefore it was not exercisable, and that the Court could not exercise it. If that were a deliberate expression of his opinion on a point argued, the case would have far greater importance than I now apprehend it to have; but I do not think that that is what the learned Judge intended to decide. I think he is giving that statement as the result of what had taken place in Court—as the result of the arguments and the facts, and for aught I know it was argued on more facts than are stated, because the case is reported with reference to the point I have mentioned, and not with reference to this other point. I think it would be straining the authority of that case too much to say it was actually a decision that a power vested "in my said executors hereinafter particularly named" was exercisable by those who proved, and not by those who did not prove.

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(1) 8th Ed. 118, 125.

(2) 14 Ves. 434.

(3) 14 Ves. 435.

Then, before turning to the particular words of the will on which the decision must rest, I ask: Is this given to the executors as part of their office? Because, if it is not, the section of the Act of Parliament has no application. I am not sure that it has much application even then, but is this given to the executors as part of their office? It seems to me that it cannot be. The duties of executors are not perhaps easy to define, and I will not attempt a definition of them; but I apprehend that directly you have either the residue or an appropriated fund clear of debts, funeral and testamentary expenses, and legacies, it immediately becomes a trust fund. If the trust is merely to hand it over to a legatee, that is part of the duty of an executor, and in one sense only he is a trustee. But if there is anything in the way of settlement, as to one person for life with remainder over, or upon trust for distribution among such persons as the executors shall think fit, then by the words determining his duty, he is constituted trustee. It is not part of his duty as executor and it may be exercised by him notwithstanding that he ceases to be executor or has never really been executor. It seems to me that the distinction between executor and trustee must be borne in mind, and that this cannot be part of the duty as executor.

Now, turning to the words of the will, there is a gift of a legacy to "my executors herein named." I have held these words to give a legacy to Mr. *Forshaw*, but I do not think that my former decision in any way controls the present, because there is no doubt that he was named as an executor and one of the persons contemplated. The reason of my decision in his favour on that question was because there were other motives to be found in the will for the gift beyond the appointment of executor. But one cannot pass over the identity of language there and in the direction for distribution. The direction is, "The residue of my estate I leave and bequeath to the above-named charitable institutions or such others or additional as my executors herein named may select." It has been argued that one might read in the names there. That is one way, no doubt, of reading the will. But whether you read in the names, or do not, I cannot regard that as other than equivalent to a power given to the gentlemen named, whom in the other part of the will he appointed executors.

Then is that a power exercisable by Mr. *Forshaw* in connection with the others? I have already said that it is not part of the executors' duty, and must be vested in them in some other character. That goes a long way towards deciding that Mr. *Forshaw* can still exercise it, notwithstanding that he has renounced probate. But the passage read from Lord *St. Leonards* on Powers (1), and the general law as to the execution of powers, aid me in the same direction. I see no reason why Mr. *Forshaw*, though he has renounced probate, should not be a trustee for the purpose of exercising this power, and although I am unwilling to decide the case too much upon technical use of language, yet I see that if I were to decide that he is not entitled to exercise the power, I should be deciding really that the persons "herein named" are not to exercise it. The testator has said that the executors herein named shall do it. If I exclude Mr. *Forshaw*, the executors herein named cannot do it. To that it may be answered that, if Mr. *Forshaw* died in the testator's lifetime, there would be a difficulty. The only answer I can give is that he has not. He is one of the persons named in the will. The power is given, and it being a power in the nature of a trust, it is still exercisable by him, notwithstanding that he is not executor.

Solicitors for Plaintiffs: *Miller & Williamson, Liverpool.*
Solicitor for Defendant: *G. A. Forshaw, Liverpool.*

C. M.

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(1) 8th Ed. 118.

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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1890, will be as follows:—

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ADMINISTRATION — *Action — Account against Executor — Retainer — Rules of Supreme Court,* 1883, *Order* XV., *r.* 1.] An order in an administration action under Order xv., rule 1, merely for an account by an executrix and reserving further consideration does not affect the right of creditors to sue her, or her right to prefer creditors. Therefore where an executrix who, after such an order had been made against her, was appointed trustee of a settlement, and entitled as such trustee to a debt due from her testator's estate:—*Held*, that she might apply the balance of the testator's estate in part satisfaction of such debt, though other debts were unpaid. *In re* BARRETT. WHITAKER *v.* BARRETT - - 70

2. —— *Advertisements for Creditors—Time to be limited for making Claims—Newspapers in which Advertisements should be inserted*—22 & 23 *Vict. c.* 35, *s.* 29—*Rules of the Supreme Court,* 1883, *Order* LV., *r.* 45.] There is no absolute rule that notices issued by executors, under sect. 29 of the Act 22 & 23 Vict. c. 35, to creditors and others to come in and claim against the estate of the testator, should be published in a London daily newspaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether executors have given such notices as are sufficient to entitle them to the protection of sect. 29, the Court will have regard to the circumstances of the particular case, such as, the place of residence of the testator and his position in life.—*Wood* v. *Weightman* (Law Rep. 13 Eq. 434) explained.—A testator was a small farmer in the country. He had lived at the same place for forty years previously to his death, and had never been engaged in any other occupation than that of farming his own land, consisting of about fifty-two acres. After his death his executors issued a notice inviting creditors and others to come in and make their claims against the testator's estate. The notice was published once in each of three local newspapers, and once in the London Gazette, but it was not published in any other London newspaper. The notice fixed the period of a month from its date for the bringing in of claims, but it was not published till a day or two after its date. After the expiration of the notice the executors distributed the estate among the claimants of whose claims they had notice:—*Held*, that, as against claims of which they had not then any notice, the notice was sufficient to entitle the executors to the protection given by sect. 29.—*Quære*, whether an appeal lies against the decision of the Judge on such a point. *In re* BRACKEN. DOUGHTY *v.* TOWNSON - - - C. A. 1

3. —— *Will—Annuity—Covenant by Testator to pay Annuity—Personal Estate insufficient—Apportionment of Liability between Tenant for Life of Real Estate and Remaindermen.*] A testator devised all his real estate (except two specified estates) to trustees in fee, in trust for his son for life, with remainder in trust for the son's first and other sons successively in tail male, with remainders over. And he devised the two specified estates upon similar trusts for the benefit of his two daughters respectively for life, with remainders to their respective issue. The testator had upon the marriage of his son entered into a covenant, for himself, his heirs, executors and administrators, with the son, to pay, during the joint lives of the son and his wife, an annuity of £700 to the son or his wife. After payment of the testator's debts and testamentary expenses his personal estate was insufficient to provide for the annuity:—*Held*, that the annuity must be

ADMINISTRATION—*continued.*

treated as a debt of the testator; that it must be apportioned between the three devised estates according to their respective values; and that each tenant for life, on paying his proportion of the annuity, would be entitled, in respect of each payment of the annuity, to a charge upon the corpus of the estate, but must keep down the interest upon the amount so charged.—*Allhusen* v. *Whittell* (Law Rep. 4 Eq. 295) distinguished. *In re* Harrison. Townson *v.* Harrison - 55

4. —— *Debts—Marshalling Assets—Pecuniary Legacies—Real Estate charged with Debts.*] A testator directed that his debts should be paid as soon after his decease as convenient, and made pecuniary and specific bequests, and specifically devised his real estate:—*Held*, that the whole of the personal estate not specifically bequeathed, not excepting pecuniary legacies, must be applied in payment of debts before the real estate was resorted to.—Statement in Seton on Decrees (4th Ed. 989, 990) explained and corrected. *In re* Bate. Bate *v.* Bate - - - 600

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ARBITRATION — *Agreement to refer — Staying Proceedings—Common Law Procedure Act,* 1854 (17 *&* 18 *Vict. c.* 125), *s.* 11.] By a lease the lessor covenanted to supply the lessee with a certain quantity of water per day. The lease contained a clause providing that if any difference should arise between the parties touching the lease or anything therein contained, or the construction thereof, or in any way connected with the lease or the operation thereof, it should be referred to arbitration. Some years afterwards, disputes having arisen between the parties as to the water supply, a written agreement was entered into binding the lessor to take certain steps with a view to securing a better supply, and in some points varying the rights of the lessee as to the supply. Afterwards the lessee commenced an action alleging that the steps mentioned in the agreement had not been taken, and also alleging that the lessor had not supplied the stipulated quantity of water, and claiming an inquiry as to the damages sustained by the Plaintiff "by reason of the matters aforesaid." The Defendant moved to stay proceedings in the action, and refer the dispute to arbitration:—*Held*, by the Court of Appeal, that in the action the Plaintiff could claim damages for breaches of the agreement as well as for breaches of the covenant in the lease, and that as the arbitration clause only applied to matters arising under the lease, it did not cover the whole subject-matter of the action.—*Wade-Gery* v. *Morrison* (37 L. T. (N.S.) 270) distinguished.—*Held*, further, that it would not be right to split up the action by referring to arbitration the matters arising under the lease, leaving the action to proceed as to the other matters, and that even if the arbitration clause could be construed so widely as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease:—*Held*, therefore (affirming the decision of North, J.), that the application must be refused. Turnock *v.* Sartoris - **C. A.** 150

2. —— *Procedure—Award—Motion to extend Time for setting aside—Jurisdiction—*9 *&* 10 *Will.* 3, *c.* 15, *s.* 2—*Judicature Act,* 1873, *s.* 26—*Judicature Act,* 1875, *s.* 17—*Order* lxiv., *rr.* 7, 14.] Under rule 7 of Order lxiv. the Court now has jurisdiction, on good cause shewn, to extend the time for moving to set aside an award, although the time limited by 9 & 10 Will. 3, c. 15, s. 2, as enlarged by rule 14 of Order lxiv., may have expired. *In re* Oliver and Scott's Arbitration - - - - - 310

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BONDS—Harbour trustees—Mortmain - 27
See Charity.

BREACH OF TRUST—Investment by trustees
See Trustee. 3. [296

BUILDING SCHEME—Restrictive covenant 265
See Covenant.

BUILDING SOCIETY—*Arbitration—Dispute between Society and withdrawing Member—Appointment of Arbitrators after Action commenced.*] The

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rules of a building society provided that every dispute between the society and any member, on which the decision of the board should not be deemed satisfactory, should be settled by a reference to arbitration, pursuant to the Building Societies Act, 1874, and that five arbitrators should be elected by the members at a general meeting, and in case of dispute the names of the arbitrators should be written on pieces of paper, and placed in a box, and the three whose names were first drawn out by the complaining party should be the arbitrators to decide the matter in dispute.—A dispute arose between an investing member and the society as to the amount which he was entitled to receive on withdrawal, and ultimately he brought an action against the society to enforce his claim. Up to this time no arbitrators had been elected under the rules. After the service of the writ a general meeting of the members was held, and five persons were elected as arbitrators.—Upon a summons by the society to stay further proceedings in the action, and that the dispute might be referred to arbitration in pursuance of the rules:—*Held*, that the rule contemplated the appointment of a standing body of arbitrators, out of whom three were to be chosen by lot to decide any particular dispute, and that the society could not, after a litigation had commenced to which they were parties, select the tribunal to decide it.—The summons was, therefore, dismissed with costs. Christie *v.* Northern Counties Permanent Benefit Building Society [62

2. —— *Power to borrow—Mortgage—Amount for time being secured by Mortgage—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 15, *sub-s.* 2.] In ascertaining the amount for the time being secured to a building society by mortgages from its members within the meaning of the Building Societies Act, 1874, s. 15, sub-s. 2, such amount is not to be limited merely to the amount of principal secured, but covers all loans due on the members' securities at the time of the loans to the society, whether for principal, or interest, or fines, or otherwise, and all instalments not then accrued due, but secured by the mortgage and outstanding.—In ascertaining the amounts advanced out of an ultra vires loan on security the whole amount secured is to be included, although a commission was charged for the advance and deducted from it. Neath Building Society *v.* Luce - - - 158

3. —— *Winding-up—Advanced and Investing Members—Liability for Losses—Contribution inter se—Redemption of Mortgages—Effect of Rules—Special Contract—Apportionment by Directors.*] The rules of a building society provided (1) that advanced members could redeem their securities on payment of the amount fixed by the tables of the society, together with the full amount which should then be due "for subscriptions, fines, and other payments"; (2) that surplus profits "after providing for all liabilities" should be appropriated equitably and equally between the investing and borrowing members; and (3) that "in the event of the directors determining," at a special meeting to be held every three years, that there was "a deficiency of income by which the society might be prevented from meeting its anticipated expenditure and liabilities," the amount of such deficiency should be "apportioned by the directors" between the investing and borrowing members.—The society, which was registered under 6 & 7 Will. 4, c. 32, got into difficulties, and was being wound up by the Court. There were no outside creditors, but the assets were insufficient to pay investing members the full value of their shares.—On application by the liquidator to place advanced members on the list of contributories, no apportionment of losses having been made by the directors:—*Held*, that the "liabilities" to be provided for under rule 2 included sums payable to investing members; that "income" in rule 3 was not used in contradistinction to capital, but meant what was coming in from all sources, and that "liabilities" in the same rule also included sums payable to investing members; that under these rules advanced members were liable to contribute to any losses together with the investing members, and that any member seeking to redeem could only do so upon paying what might be due from him in respect of this liability. The fact that the directors had not "determined" and "apportioned" the loss, made no difference now that the society was being wound up by the Court.—Rules similar to rule 3 constitute a special contract between the members, under which advanced members are liable to contribute rateably with investing members, both towards paying outside creditors and also in sharing the other losses incurred by the society, which, but for such contract, would, according to *Tosh* v. *North British Building Society* (11 App. Cas. 489), fall on investing members alone. *In re* West Riding of Yorkshire Permanent Benefit Building Society - - - - - 407

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—— *Avern* v. *Lloyd* (Law Rep. 5 Eq. 383) overruled - - - - 401
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—— *Christopherson* v. *Naylor* (1 Mer. 320) approved - - - - 569
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—— *Cole* v. *Sewell* (4 D. & War. 1 Sc., 2 H. L. C. 186) considered - - - 246
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—— *Davies, In re* (38 Ch. D. 210) approved 18
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—— *Edmunds* v. *Low* (3 K. & J. 318) disapproved - - - - 260
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—— *Feilden* v. *Slater* (Law Rep. 7 Eq. 523) distinguished - - - - 343
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—— *Gilbert* v. *Endean* (9 Ch. D. 259) followed
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—— *Gylbert* v. *Fletcher* (Cro. Car. 179) followed - - - - 165
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—— *Henderson* v. *Henderson* (3 Hare, 100) considered - - - - 296
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—— *Hyde* v. *Greenhill* (1 Dick. 106) followed
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—— *Johnson, In re* (42 Ch. D. 505), approved
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—— *Keates* v. *Burton* (14 Ves. 434) distinguished
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—— *Lake* v. *Plaxton* (10 Ex. 196) considered
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—— *Lascelles* v. *Lord Onslow* (2 Q. B. D. 433) considered - - - - 484
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—— *Leeds, Duke of* v. *Earl of Strafford* (4 Ves. 80) followed - - - 519
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—— *Mills* v. *Jennings* (13 Ch. D. 639) distinguished - - - - 183
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—— *Stedman, In re* (W. N. (1888) 119), explained - - - - 82
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—— *Sutton* v. *Sutton* (22 Ch. D. 511) considered
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—— *Thomas* v. *Sylvester* (Law Rep. 8 Q. B. 368) followed - - - - 519
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—— *Tosh* v. *North British Building Society* (11 App. Cas. 489) considered - 407
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—— *Union Plate Glass Company, In re* (42 Ch. D. 513), dissented from - - 628
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—— *Weikersheim's Case* (Law Rep. 8 Ch. 831) explained and distinguished - 198
See PARTNERSHIP. 1.

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—— *Wood* v. *Weightman* (Law Rep. 13 Eq. 434) explained - - - - 1
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CHARITY—*Mortmain—Interest in Land—Bonds of Harbour Trustees—Assignment of "rates, tolls, rents, &c."—9 Geo. 2, c. 36.*] Harbour trustees, incorporated by a special Act with which the Commissioners Clauses Act, 1847, was incorporated, had power given to them to borrow money on mortgage of the tolls, rates, and dues authorized by the Act. The mortgagees were authorized to enforce payment of arrears of interest by the appointment of a receiver. All rates, dues, and income received by the trustees were to be carried to the credit of "The Harbour Fund," and the moneys carried to that credit were to be applied—(1) in paying the interest on moneys borrowed; (2) in maintaining and regulating the harbour and its navigation; (3) in payment of certain rent-charges; (4) in payment of sums directed to be set apart to make a sinking fund for paying off mortgages, and the surplus was to be applied for the general purposes of the Act. The trustees borrowed money on the security of bonds for £100 each, by each of which they assigned to the mortgagee such proportion of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the sum of £100 bore to the whole money borrowed, to hold the same to the mortgagee until the £100 with interest was paid. Among other tolls were tolls which the trustees were authorized to demand before persons, cattle, and carriages were allowed to pass over certain bridges belonging to the trustees:—*Held* (affirming the decision of North, J.), that these bonds were not mortgages of the undertaking as in *Gardner* v. *London, Chatham, and Dover Railway Company* (Law Rep. 2 Ch. 201), but specific mortgages of a share of the bridge tolls and other tolls and rates arising under the Act, that the bridge tolls being paid for passing over bridges on the land of the trustees were an interest in land, and that the bonds, therefore, were impure personalty within 9 Geo. 2, c. 36. *In re* DAVID. BUCKLEY *v.* ROYAL NATIONAL LIFEBOAT INSTITUTION [C. A. 27

—— Trustee—Investment—Trust Investment Act - - - - - 420
See TRUSTEE. 2.

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See HUSBAND AND WIFE. 1.

CLASS—Gift to a - - - - 569
See WILL. 5.

COMMON—*Pasture—Inclosure by Lord of Manor—Sufficiency of Common.*] In an action brought on behalf of all the tenants of a manor to restrain

COMMON—*continued.*
the lord from inclosing parts of the waste, and from digging or removing any part of the soil of the waste, so as to interfere with their rights of common, it was shewn that the tenants had rights of common of pasturage appendant over the waste for sheep, and that certain landowners not tenants of the manor had rights of common appurtenant over it for sheep, and that such rights appendant and appurtenant entitled the commoners to turn out a greater number of sheep than the waste would carry, but it was also shewn that having regard to the average number of sheep which had been turned out for many years it was highly improbable that nearly as many sheep as the waste could carry would ever be turned out upon it:—*Held*, by the Court of Appeal, affirming the decision of Stirling, J., that the question whether there was a sufficiency of common must be determined, not according to the average number of sheep which the commoners had for a great number of years been in the habit of turning out, but according to the aggregate number of sheep which they were entitled to turn out. That there was therefore not a sufficiency of common, and that the lord ought to be restrained from doing any acts which would diminish the amount of pasturage.—*Lake* v. *Plaxton* (10 Ex. 196) and *Lascelles* v. *Lord Onslow* (2 Q. B. D. 433) considered.—Whether, in ascertaining sufficiency of common, regard ought to be had to the present and modern system of sheep farming, according to which the sheep do not while turned out get all their sustenance from the common, *quære*. Robertson *v.* Hartopp **C.A. 484**

COMPANY—*Contract for paid-up Shares—Registration of Contract—Contract executed by Company only—Companies Act*, 1867, *s.* 25.] In pursuance of a scheme for the reconstruction of a company in liquidation, a meeting of the debenture-holders, of whom M. was one, was held, at which a resolution was passed approving of the scheme to transfer the assets to a new company and to allot certain fully paid-up shares to the debenture-holders in lieu of their debentures. To this resolution M. assented. The new company was accordingly formed, and a contract was drawn up and expressed to be made between the new company of the one part, and M. and the other intended shareholders of the other part, for allotting the shares in the terms of the resolution, but was executed by the company only. This document was duly registered, and the shares were allotted and accepted by the allottees:—*Held*, on a motion by M. to rectify the register by removing his name from the list of shareholders, that there was no contract in writing registered within the meaning of the 25th section of the Companies Act, 1867, and therefore M. could not hold the shares as paid up; and that he was entitled to have his name removed from the register. *In re* New Eberhardt Company. *Ex parte* Menzies - - - - - **C. A. 118**

2. —— *Reduction of Capital—Confirmation by Court—Reduction of some Shares only—Jurisdiction—Discretion—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 *&* 41 *Vict. c.* 26), *s.* 3.] Under the Companies Acts, 1867 and 1877, the Court has power to sanction a special resolution for the reduction of some only of the shares of a company. *In re Union Plate Glass Company* (42 Ch. D. 513) dissented from. *In re* Gatling Gun - - **628**

3. —— *Special Resolutions—Notice of Meeting.*] The articles of association of a company provided that "seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting." Notice was given that an extraordinary general meeting would be held on the 12th of July at the hour and place therein mentioned for the purpose of considering, and if deemed advisable, of passing the resolutions set forth in the notice, and it concluded, "should such resolutions be duly passed the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting which will be held on Monday, the 29th of July, at the same time and place":—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that the said meeting was invalid, for that though it was possible to put on the notice the construction that a meeting would be held on the 29th of July, whether the resolutions were passed on the 12th or not, the construction which an ordinary business man would put upon the notice would be that the meeting would be held only if the resolutions were passed at the first meeting; that the notice of the second meeting was therefore conditional, and, being bad when sent, could not be made good by the shareholders acquiring information aliunde that the resolutions had been passed at the first meeting. Alexander *v.* Simpson - - - - - **C. A. 139**

4. —— *Winding-up—Literary Society—Trading Company—"Business"—Companies Act*, 1862, *s.* 199—*Literary and Scientific Institutions Act*, 1854, *ss.* 30, 33.] Sect. 199 of the Companies Act, 1862, which deals with the winding-up of unregistered companies, is only applicable to trading associations, inasmuch as such unregistered companies are to be wound up at their "place of business," and "business" must ordinarily be trading under the Act.—Where a literary or scientific institution, not established for the purpose of gain, is dissolved by its members, its property ought to be given to some kindred institution, to be determined in manner prescribed in sect. 30 of the Literary and Scientific Institutions Act, 1854, even if the rules contain a provision that the property of the society on its dissolution is to be divided among its shareholders, such a provision being contrary to the Act.—Such an institution is not a joint stock company, although some of its members may be shareholders, and does not therefore come within the proviso in sect. 30 of the Act of 1854, which excepts from the operation of the section any institution "which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company." *In re* Bristol Athenæum - - - **236**

5. —— *Winding-up Petition—Locus Standi of Petitioner—"Creditor"—Garnishee Order absolute against Company—Companies Act*, 1862

COMPANY—*continued.*

(25 & 26 *Vict. c.* 89), *ss.* 80, 82—*Rules of Supreme Court*, 1883, *Order* XLV., *s.* 2.] A garnishee order does not create, as between the garnishor and garnishee, any debt either at law or in equity.—Accordingly, a person who has obtained a garnishee order absolute directing a company to pay to him a debt due by them to a creditor of his against whom he had recovered judgment, does not thereby himself become a creditor of the company, and is not, therefore, entitled to petition for the winding-up of the company, on failure by them to obey the order.—The order of North, J., affirmed. *In re* Combined Weighing and Advertising Machine Company - - C. A. 99

6. —— *Winding-up — Proof — Salary of Managing Director—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-s.* 7—*Debt due to Member of Company in his Character of a Member.*] Arrears of the salary due to a managing director of a company in which directors were obliged to be shareholders, and damages for breach of contract by the company to employ him as managing director at such salary:—*Held*, not to be debts due to him in his character of a member within the meaning of sect. 38, sub-s. 7, of the Companies Act, 1862. *In re* Dale & Plant - 255

7. —— *Winding-up—Voluntary Liquidation of Company and Reconstruction — Companies Act*, 1862, *s.* 161—*Limitation of Time for Application for New Shares.*] The P. P. and C. Gold Mining Company passed resolutions for a voluntary winding-up with a view to reconstruction, and appointed a liquidator who was authorized (1) to sell the property to a new company for a consideration to be paid in shares; (2) to procure to be allotted to every member of the Old Company requiring the same, as his nominee under the contract, two shares for every share held by him in the Old Company; provided that to entitle the members of the Old Company to an allotment of new shares application must be made for the same in writing in the form prescribed by the liquidator accompanied by a payment of 6*d.* per share on the number of shares applied for within ten days next after notice requiring him to apply for the same should have been given in the manner in which notices were required to be given to members under the articles of association of the Old Company; and he was directed (3) to dispose of so many of the 200,000 shares as should be in excess of the number to which the members of the Old Company would if they all applied for the same be entitled, and also of the shares for which applications were not made within the time and on the terms mentioned; and in making such disposition of the shares he should not be treated as a trustee for the members of the Old Company or for the New Company, but should have full discretionary power of selling the same to any person at such prices and on such terms as he might think fit, and it should not be necessary to first offer such surplus shares to the shareholders of the Old Company, and the New Company should be entitled to retain all shares not applied for and taken by the liquidator or his nominees within three months after the incorporation of the New Company. If the liquidator should obtain any premium for the shares to which members of the Old Company other than dissentients would have been entitled had they applied for the same, as mentioned, such premiums less the costs of realization should belong to such members. A contract was entered into between the Old Company, the liquidator, and a New Company, and it contained stipulations as to the sale.—On the 12th of June a circular was sent to the shareholders in the Old Company, of whom the Plaintiff was one, requiring an application and deposit on or before the 25th of June. The Plaintiff did not attend any of the meetings, but he did not dissent from the resolutions passed. He did not send in any application until the 24th of August, 1889, and at that time the liquidator had carried into effect the arrangements, and was consequently unable to give him any shares. The Plaintiff commenced an action in October, 1889, and a motion was made on his behalf for, in effect, an injunction to restrain the Defendants from carrying the agreement into effect:—*Held*, that the resolutions were not ultrà vires or otherwise invalid, and motion consequently refused. Postlethwaite *v.* Port Phillip and Colonial Gold Mining Company 452

COMPENSATION — Mistake in particulars of sale - - - - - 191
See Mortgage. 2.

COMPROMISE—Authority of partner - 198
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—— Summons to set aside - - - 185
See Practice. 4.

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CONTRACT—Company—To take shares—Registration - - - - 118
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CONTRIBUTION—Members of building society
See Building Society. 3. [407

COPYHOLD — *Rent-charge — Uncertainty as to Land charged—Rent-charge created in favour of Lord of Manor on Enfranchisement of Copyholds—Action by Grantee of Rent-charge to recover Arrears and ascertain Land—Costs*—15 & 16 *Vict. c.* 51, *s.* 24—50 & 51 *Vict. c.* 73, *s.* 16.] A copyhold tenant of a manor is under an obligation to keep the boundaries of his tenement distinct; and if he neglects to do so the Court will direct an inquiry for ascertaining the boundaries, and, if that should be impossible, will order land of equal value to be set out in substitution. If the tenement is enfranchised the obligation to preserve the boundaries ceases, but the tenant is still liable for default which had happened before the enfranchisement.—The lord of a manor obtained the enfranchisement of a copyhold tenement under the 15 & 16 Vict. c. 51, reserving a rent-charge to himself. The boundaries had become

COPYHOLD—*continued.*
confused before the enfranchisement, but the lord did not avail himself of the power given by sect. 24 of the Act to have the boundaries ascertained. The rent-charge having fallen into arrear, the grantee of the rent-charge brought an action to ascertain the boundaries of the land charged with the rent-charge, and if that could not be done, to have land of equal value set out in substitution :—*Held*, affirming the decision of Kay, J., that the lord and those claiming under him did not lose their rights by reason of the lord's omission to have the boundaries ascertained under the Act, and that the Plaintiff was entitled to the relief prayed, the costs of the inquiry being reserved.—*Duke of Leeds* v. *Earl of Strafford* (4 Ves. 180) followed.—*Held*, also, that Plaintiff was entitled to a personal judgment against the tenant for the arrears of rent-charge accrued during his occupancy of the land.—*Thomas* v. *Sylvester* (Law Rep. 8 Q. B. 368) followed.—The powers given to the owner of a rent-charge by the Copyhold Act, 50 & 51 Vict. c. 73, s. 16, do not preclude him from enforcing his other remedies for recovering his rent-charge. Searle *v.* Cooke - - - **C. A. 519**

COSTS—Patent action—Certificate - - 46
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—— Sale under Settled Land Act - - 84
See Settled Land Act.

—— Taxation—Solicitor's remuneration - 52
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COVENANT—*Restrictive—Building Scheme on Sale of Estate—Obligation of Vendor—Sale by Trustees—Recital in Deed—Implied Covenant—Injunction against authorizing Departure from Scheme.*] A restrictive covenant or contract not being a limitation of property is not obnoxious to the rule against perpetuities.—*London and South Western Railway Company* v. *Gomm* (20 Ch. D. 562) explained.—A building estate was offered for sale by auction by the trustees of a will in plots, according to a plan and particulars and conditions of sale referring to a deed of mutual covenants, which was to be executed by the vendors and each of the purchasers. The deed contained a recital that it was intended to be a part of all future contracts for sale of the plots that the several purchasers should execute the deed, and be bound by the stipulations contained in it; and thereby it was expressed that each purchaser covenanted with the vendors and with the other purchasers to conform to certain stipulations restrictive of the mode of building on the plots, but there was no express covenant to the like effect by the vendors. Some of the plots were sold, and the several purchasers executed the deed, as did also the vendors. For twenty years subsequently the stipulations were observed, and as plots were from time to time sold the respective purchasers executed the deed At the expiration of that period the existing trustees of the will put up a portion of the estate for sale in different plots, and under conditions authorizing a mode of building which was not in conformity with the stipulations contained in the deed. Purchasers who had executed the deed brought an action for an injunction to restrain the trustees from selling except upon the terms of the deed :—*Held*, that the recital in the deed was not a mere expression of intention which the vendors were at liberty to change, but the effect of the deed was that the vendors thereby entered into a covenant not to authorize the use of the unsold plots in a manner inconsistent with the conditions of the building scheme as therein expressed; that even if the deed had not the effect of a covenant by the vendors, yet the trustees were bound by a contract, implied from the whole transaction, restricting their dealing with the land in violation of the building scheme; and that an injunction ought to be granted restraining them from authorizing any purchaser to build contrary to the building scheme. Mackenzie *v.* Childers **265**

—— Restraint of trade - - - 343
See Restraint of Trade.

—— To serve—Apprenticeship deed - 165
See Infant. 1.

—— To settle after-acquired property - 290
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CROWN—Rights of—Parliamentary deposit—Abandonment of railway company 536
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DAMAGES—*Inquiry—Detention of Cargoes—Judgment varied, but Inquiry allowed to stand—Inquiry whether satisfied by giving nominal Damages—Principles to be adopted in working out Inquiry—Chief Clerk's Certificate—Variation of—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2—*Jurisdiction—Damages in substitution for Injunction—Threatened Injury—Possession taken under Order of Court.*] Lord Cairns' Act did not confer upon the Court of Chancery any jurisdiction to award damages in a case where no wrongful act had been committed by the person against whom an injunction was sought. Therefore where an action is brought for an injunction in respect of a threatened injury, and no actual wrong has been committed by the defendant, the Court has no jurisdiction to give damages in substitution for such injunction. The Plaintiffs brought an action against the Defendants for delivery to the Plaintiffs of certain cargoes then at sea, to which they claimed to be entitled, for an injunction to prevent the Defendants from receiving them, and for damages for their detention. The Defendants by their pleadings claimed the right to receive the cargoes, and shewed that they intended to receive them. Shortly after the writ was issued an order was made by consent under which the Defendants received the cargoes, keeping accounts, and abiding by any order of the Court as to the proceeds. At the time when this order was made only two of the cargoes had arrived in this country. At the hearing the Judge held that the conduct of the Defendants amounted to an unlawful detention of the cargoes, and gave judgment for the Plaintiffs with an inquiry what damages had been sustained by them by reason of the detention of the cargoes by the Defendants. The Defendants appealed against the whole of this judgment, but subsequently abandoned their appeal against the portion containing the inquiry, and claimed to be entitled to reimbursement for

DAMAGES—*continued.*
expenses incurred by them in respect of the cargoes received under the consent order. The appeal was dismissed, and the Defendants appealed to the House of Lords, who varied the judgment by allowing the claim to expenses, but affirmed it in other respects. No application was made to the House to vary or alter the terms of the inquiry, which accordingly remained as part of the judgment. The Chief Clerk made a certificate finding damages on the footing that there had been a detention of all the cargoes, commencing on their arrival in this country. The Defendants applied to vary the certificate, contending that the effect of the decision of the House of Lords was that there had been in fact no wrongful detention, and that nominal damages only ought to be given. Kay, J., refused to vary the certificate, and the Defendants appealed:—*Held*, by Cotton and Fry, L.JJ., Bowen, L.J., dissenting, that the inquiry in effect affirmed that there had been a wrongful detention of the cargoes in question giving rise to damages; that such an inquiry could not be satisfied by finding merely nominal damages, nor was it competent to the Court in working out such an inquiry, not reversed by any Court, to deprive it of all force and effect by reviewing the circumstances under which it was made; that the decision of the House of Lords had left the inquiry in force, and that no reasonable ground had been shewn for varying the certificate of the Chief Clerk:—*Held*, by Bowen, L.J., that the effect of the decision of the House of Lords was that no act of possession under the consent order was wrongful, or gave any right to damages; that the Court had no jurisdiction to give damages in a case where a wrongful act had not been committed, but only threatened; that the Chief Clerk was not precluded by the terms of the inquiry from finding that there were nominal damages only; that as he had made no distinction between the cargoes, but had apparently proceeded upon the view that taking possession under the consent order was itself an act of detention from which damages would flow, his certificate was wrong; and that the matter ought to be referred back to him in order that he might state what were the wrongful act or acts of detention in respect of which he found damages, and what damages he found in respect of them. DREYFUS *v.* PERUVIAN GUANO COMPANY - - - - - 316

DEATH—Before date of will - - 569
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DEBT—Proof in winding-up—Due to member of company - - - - 255
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—— Satisfaction by legacy - - - 260
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—— Restriction of — Bankruptcy Act, 1883—Action in Chancery Division - 175
See PRACTICE. 5.

EXECUTOR—*Discretionary Power—Executor renouncing.*] A testator appointed three persons executors. He then gave the residue of his estate to certain charitable institutions or others, as "my executors herein named may select, to be divided in such proportions as they may approve of." Two of the executors proved the will. The third executor renounced probate:—*Held*, that, nevertheless, the third executor was entitled to take part in the selection of the charities, and in the distribution of the residue. *Keates* v. *Burton* (14 Ves.) 434 distinguished. CRAWFORD *v.* FORSHAW [643

—— Administration of assets 1, 55, 70, 600
See ADMINISTRATION. 1, 2, 3, 4.

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FRAUDS, STATUTE OF—Dissolution of partnership—Interest in land - - 208
See PARTNERSHIP. 2.

—— Fraudulent appointment - - 615
See POWER. 2.

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See COMPANY. 5.

HARBOUR BONDS—Mortmain - - 27
See CHARITY.

HUSBAND AND WIFE—*Chose in Action of Wife—Title of Husband—General Probate of Will of Married Woman.*] A woman, married before the Married Women's Property Act, 1882, who was entitled to choses in action, but had no separate property, nor any property of which she could dispose by will, made, without the assent of her husband, a will by which she appointed executors, and gave all her property away from her husband. After her death probate of her will, which, pursuant to the Rules of 1887, was in general form, was granted to one of the executors. The husband brought an action in the Chancery Division against the executor to recover the choses in action:—*Held*, by Kay, J. (40 Ch. D. 185), that the action must be dismissed, for that the Plaintiff suing the executor

HUSBAND AND WIFE—*continued.*
in the Chancery Division must treat the will as valid, in which case he had no title, and that his remedy was to apply to the Probate Division to revoke the probate and grant him administration of such estate of his wife as she could not dispose of by will:—*Held*, by the Court of Appeal, that the effect of the general probate was only to enable the executor to get in all the assets of the wife, whether she had power to dispose of them by will or not, and that it did not affect the beneficial title to them; that the husband was beneficially entitled to the choses in action, that the executor was a trustee of them for him, and that the husband was entitled to have them transferred to him by the executor, subject to the same deductions as they would have been subject to if the husband had taken out administration under the old practice. Smart *v.* Tranter [C. A. 587

2. —— *Will of Married Woman—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 1, 2, 5.] By marriage settlement in 1863 the wife's property was limited (in default of issue) upon trust for her absolutely if she survived her husband, but if she should die in his lifetime then upon such trusts as she should by will appoint, and in default of appointment for her next of kin. She during coverture made a will dated in 1886 by which, if she should die during the coverture, she appointed the fund to trustees upon certain trusts, and she bequeathed to them upon the same trusts all the property she could dispose of by will. She survived her husband, and died without republishing her will, never having had any issue:—*Held* (affirming the decision of Kay, J.), that the will did not dispose of the settled property.—Sect. 1, sub-sect. 1, of the Married Women's Property Act, 1882, is to be construed along with sects 2 and 5, and does not give a married woman power to dispose of property not falling within the scope of either of the two latter sections. *In re* Cuno. Mansfield *v.* Mansfield - - C. A. 12

—— Wife's reversionary interest - - 290
See Settlement.

INCLOSURE — Lord of manor — Common of pasture - - - - 484
See Common.

INFANT — *Apprenticeship Deed — Covenant to serve—Validity of Contract—Negative Covenant—Injunction to restrain Breach.*] By an apprenticeship deed between an infant, her parent, and the master, an infant was bound apprentice for a term of seven years to be taught stage dancing upon certain terms, by one of which the infant purported to bind herself not to contract or accept any professional engagement during the said term without the consent of her master; the deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements during the said term, in return for which the infant's services were, during this period, to be entirely at the disposal of the master, and she was to enter into no professional engagement without his consent. The infant having accepted an engagement to perform for the Defendant B. before the expiration of the said term without the master's consent, application was now made for an interim injunction to restrain the infant from performing, and the Defendant B. and the parent from inducing or allowing her to perform, in violation of the terms of the apprenticeship deed:—*Held*, on the authority of *Gylbert* v. *Fletcher* (Cro. Car. 179), that inasmuch as no action could be brought against an infant on a covenant to serve, the negative clauses in this apprenticeship deed could not be enforced by injunction, and that the application must be refused both as against the infant and the other Defendants.—*Fellows* v. *Wood* (59 L. T. (N.S.) 513) considered and distinguished. De Francesco *v.* Barnum - - - - - 165

2. —— *Maintenance—Accumulations—Vested Life Estate — Right to Accumulations during Minority — Apportionment of Maintenance as between Contingent and Vested Life Estates—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2.] A testator bequeathed a legacy to his trustees, upon trust, if and when R. should attain twenty-one, to pay the income thereof to her during her life, with remainders over. And the testator bequeathed to his trustees one-sixth part of the proceeds of the residue of his estate, upon trust to pay the income thereof to R. for her life. The will empowered the trustees in their discretion during the minority of R. to apply the whole or part of the income of the legacy for her maintenance, and directed that the surplus should be accumulated so as to follow the corpus of the fund from which it arose. The testator died in March, 1884. R. attained twenty-one in May, 1889. In July, 1886, an order was made that £200 per annum should be allowed for her maintenance, and that the trustees of the will should, out of the funds subject to the trusts thereby declared in favour of the infant, pay on account of the maintenance £100 a year to her guardian. The residue of the £200 was to be paid out of other property to which she was entitled. After the date of this order, and thenceforth during the minority of the infant the trustees paid the £100 a year to the guardians out of the gross income arising from the legacy and the share of residue, without distinguishing between the two funds, and accumulated the surplus. The income produced by the legacy was less than £100:—*Held*, that R. was, within the meaning of sub-sect. 2 of sect. 43 of the Conveyancing Act, 1881, so far as the accumulations had arisen from the income of the share of the residue, the person who had become ultimately entitled to the property from which they had arisen, and that they must be paid to her:—*Held*, also, that, the trustees not having exercised any discretion as to the fund out of which the allowance for maintenance should be paid, the Court would now exercise that discretion and direct that it should be deemed to have been paid primarily out of the income of the legacy, that being most for the benefit of R. *In re* Wells. Wells *v.* Wells - - - 281

INJUNCTION—Breach of covenant in apprenticeship deed - - - 165
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—— Obstruction of light—Death of plaintiff
See PRACTICE. 6. [607

—— Restrictive covenant—Building scheme
See COVENANT. [265

INQUIRY—As to damages—Nominal damages
See DAMAGES. [316

INTEREST—Costs—London agent of country solicitor - - - - 353
See SOLICITOR. 1.

—— Payment of—Statue of Limitations—Mortgage-money - - - - 106
See LIMITATIONS, STATUTE OF. 2.

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See PRACTICE. 2. [23

INVESTMENT—Breach of trust—Purchase of equity of redemption - - 296
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—— Trustee—Trust Investment Act 420, 431
See TRUSTEE. 1, 2.

JUDGMENT—In default of pleading - 287
See PRACTICE. 9.

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See MEDICAL PRACTITIONER.

JURISDICTION — Arbitration — Enlargement of time for setting aside award - 310
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—— Originating summons - - - 18
See PRACTICE. 10.

—— Summons to set aside compromise - 185
See PRACTICE. 4.

LANDLORD AND TENANT — Production of lessor's title—Agreement for lease 574
See PRACTICE. 7.

LANDOWNER—Abandonment of railway—Parliamentary deposit - - - 536
See RAILWAY COMPANY. 1.

LEASE—Arbitration clause - - - 150
See ARBITRATION. 1.

LEGACY—Satisfaction of debt - - 260
See WILL. 7.

LIEN—Maritime—Towage - - - 241
See SHIP.

LIGHT—Surplus lands of railway company—railway arches - - - 470
See RAILWAY COMPANY. 2.

LIMITATIONS, STATUTE OF—*Charge of Debts on Real Estate—37 & 38 Vict. c. 57, ss. 8, 10—Gift of Real and Personal Estate—Blended Fund—Debt barred against personal, not against real, Estate—Advertisements for Creditors—Sending in of Claim by Creditor not equivalent to bringing of Action.*] A testator gave all his property upon trust for sale and conversion into money, and "after payment thereout" of his debts and funeral and testamentary expenses, to be held upon certain trusts. The executor advertised for creditors, and a creditor sent in a claim. More than six, and less than twelve, years after the alleged debt was incurred, the executor, having applied for and failed to obtain from the creditor particulars of the claim, took out a summons asking that the claim might be adjudicated upon by the Court:—*Held*, as to the real estate, that the testator's debts being by his will charged thereon, the period of limitation was twelve years, and consequently the claim was not barred.—Whether as to such proportion of the debt as was properly attributable to personal estate the claim ought not to be considered as barred, *quære*, *In re* STEPHENS. WARBURTON *v.* STEPHENS - 39

2. —— *Principal and Surety—Mortgagor and Mortgagee—Covenant for payment of Mortgage Debt—Payment of Interest—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14.] By a mortgage deed dated in 1872, F. the mortgagor, and M. as his surety, jointly and severally covenanted for payment of the mortgage debt with interest on the 10th of June, 1873. F. paid the interest till 1880, but paid nothing afterwards. M. died in 1888, never having made any payment or given any acknowledgment. The executrix of the mortgagee claimed to be a creditor against M.'s estate for the mortgage debt and interest:—*Held*, by Kay, J., and by the Court of Appeal, that assuming the 8th section of the Real Property Limitation Act, 1874, to apply to an action brought on a covenant in a mortgage deed, not against the mortgagor as in *Sutton* v. *Sutton* (22 Ch. D. 511), but against a surety, the payment of interest by the mortgagor prevented the statute from running in favour of the surety, and that the right against M.'s estate was not barred.—*Per* Cotton, L.J. :—Sect. 8 is applicable to an action against a surety as well as to one against the mortgagor.—*Per* Bowen, L.J., and Kay, J. :—The section does not apply to a personal action unless brought against the mortgagor or his representatives. *In re* FRISBY. ALLISON *v.* FRISBY - - - C. A. 106

LITERARY INSTITUTION—Winding-up - 236
See COMPANY. 4.

MAINTENANCE—Infant - - - 281
See INFANT. 2.

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MARSHALLING ASSETS—Charge of debts—Real estate—Pecuniary legacies 600
See ADMINISTRATION. 4.

MEDICAL PRACTITIONER—*Judicial Inquiry—Domestic Forum—Personal Interest of Member of Tribunal—Medical Act*, 1858 (21 & 22 *Vict. c.* 90), *s.* 29.] The General Council of Medical Education and Registration, acting under the powers of the Medical Act, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect, and removed his name from the register of medical practitioners.—The proceedings were instituted by the managing body of a company called the Medical Defence Union, whose object was to protect the characters of medical practitioners and to suppress and prosecute unautho-

MEDICAL PRACTITIONER—*continued.*
rized practitioners. Two out of twenty-nine persons who held the inquiry were members of the Medical Defence Union, but not of the managing body of the Union:—*Held*, by Cotton and Bowen, L.JJ. (affirming the decision of North, J.), dissentiente Fry, L.J., that the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry; and the Court refused to interfere with the decision of the Council. LEESON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION - - - - C. A. 366

MEETING OF SHAREHOLDERS — Notice of meeting - - - - 139
See COMPANY. 3.

MISTAKE—Particulars of sale—Compensation
See MORTGAGE. 2. [191

MORTGAGE — *Foreclosure Action — Parties — Trustee representing Cestuis que trust—Rules of the Supreme Court*, 1883, *Order* XVI., *r.* 8.] A mortgagee who is a trustee of his mortgage for the beneficial owners of the mortgage money, and who has become bankrupt, cannot, as Defendant to a foreclosure action by a prior mortgagee, properly represent his cestuis que trust, but, notwithstanding rule 8 of Order XVI., the cestuis que trust are necessary parties to the action.—*Mills* v. *Jennings* (13 Ch. D. 639) distinguished. FRANCIS *v.* HARRISON - - - - 183

2. —— *Sale by First Mortgagee—Mistake by Agent — Incorrect Particulars — Compensation to Purchaser — Liability to Second Mortgagee — Measure of Liability—Form of Order.*] On a sale by first mortgagees their auctioneer inserted in the particulars a statement as to the condition of the roads on the property, which turned out to be incorrect; and the purchaser declined to complete without compensation. Compensation was allowed, and the sale was completed:—*Held*, by Kekewich, J., that the first mortgagees were liable to the second mortgagees in respect of the mistake, and in taking the account between them must be charged with the sum allowed as compensation.—On appeal,—*Held*, by the Court (in varying the judgment of Kekewich, J.), that the first mortgagees were liable to the second mortgagees for any loss occasioned by the mistake, but that the difference between the price realized and that which the property would have realized if there had been no misdescription, was, and the sum allowed as compensation, was not, the true measure of such liability; and the second mortgagees desiring it, and the first mortgagees not objecting to it, the Court directed an inquiry whether the property would have sold for any and what sum in excess of the amount actually realized, in case it had been sold without the misstatement; with consequential directions; the costs of such inquiry to follow the result. TOMLIN *v.* LUCE - - - - C. A. 191

—— Building society—Amount secured - 158
See BUILDING SOCIETY. 2.

—— Client to solicitor—Preparation of—Profit costs - - - - 52
See SOLICITOR. 2.

MORTGAGE—*continued.*

—— Covenant by surety to pay mortgage money —Statute of Limitations - - 106
See LIMITATIONS, STATUTE OF. 2.

—— Foreclosure action - - - 287
See PRACTICE. 9.

—— Priority—Originating summons - 391
See PRACTICE. 3.

MORTMAIN—Bonds of harbour trustees - 27
See CHARITY.

NOTICE TO TREAT—Abandonment of railway—Rights of landowners - - 536
See RAILWAY COMPANY. 1.

PARTICULARS OF OBJECTIONS—Patent action
See PATENT. 2. [46

PARTIES — Foreclosure action — Trustee and cestui que trust - - - 183
See MORTGAGE. 1.

PARTITION ACTION — *Practice — Request for Sale by Owners of Moiety—Proof of Title at Hearing—Inquiry in Chambers as to Persons interested.*] As a general rule, when in a partition action a request for a sale is made at the trial by persons who allege that they are the owners of a moiety of the property, an inquiry will be directed in Chambers to ascertain the persons interested in the property.—But in simple cases, where the value of the property is small, the Court may at the trial order an immediate sale, upon being satisfied as to the persons interested. —*In re Stedman* (W. N. 1888, p. 119) explained. WOOD *v.* GREGORY - - - - 82

PARTNERSHIP—*Deed of Dissolution—Power of one Partner to compromise Debts—Power to accept Shares in satisfaction of Debt—Powers of Receiver.*] There is no power in one partner, in the absence of special authority from his co-partners or evidence of a special course of dealing, to accept shares in a company even though fully paid up in satisfaction of a debt due to the firm. Nor has the Court jurisdiction in an action for winding-up the partnership, to confer on a receiver greater powers in this respect than a partner would have had.—*Weikersheim's Case* (Law Rep. 8 Ch. 831) explained and distinguished. NIEMANN *v.* NIEMANN - - - C. A. 198

2. —— *Interest in Land—Agreement to retire—Statute of Frauds—Rough Draft—More formal Document intended—Specific Performance—Right to use the Name of retired Partner.*] G., S., & B. were partners in trade under the firm of "G., S., & B.," and the partnership assets comprised leaseholds. S. and B. agreed with G. to retire from the business and to assign their respective shares to him, and B. signed and gave to G. the following memorandum: "Rough Draft. Memorandum from G., S., & B. This is to record that in consideration of G. or his executors paying B. or his assigns the sum of £100 on the 1st of January, 1890, and the sum of £100 on every 1st of January for the nine succeeding years, B. agrees to withdraw from the firm of G., S., & B." The parties intended that a more formal document should be prepared and signed by them respectively.—In an action by G. to enforce specific

PARTNERSHIP—*continued.*

performance of the above agreement:—*Held*, by Kekewich, J., that although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire and to assign his share in the partnership assets, is an agreement to assign an interest in land and must be evidenced by a sufficient memorandum within the Statute of Frauds. On appeal by B. this point was not argued, but the Court expressed approval of the decision.—*Held*, by the Court of Appeal (affirming the decision of Kekewich, J.), (1) that the memorandum signed by B. was a sufficient acknowledgment by him in writing within the statute, for it meant that he should retire at once, and implied that he should assign his share to G., and that G. should indemnify him against the liabilities of the partnership; and that as the memorandum fairly comprised all the material terms between the parties it was an enforceable contract within the statute, notwithstanding that a more formal document was intended. (2) That as there was no express agreement to assign the goodwill, G. had no right to continue to use the name of B. by carrying on business under the old partnership name. —*Levy* v. *Walker* (10 Ch. D. 436) distinguished. Gray *v.* Smith - - - - **C. A. 208**

PASTURE—Common of—Inclosure by lord of manor - - - - **484**
See Common.

PATENT—*Action for Infringement—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] F. was exclusive licensee of D., a patentee; he was also exclusive licensee of B., a subsequent patentee. D. sued F. for a declaration that articles made under B.'s patent were an infringement of his, D.'s patent, and for an injunction to restrain manufacture and sale under B.'s patent without paying royalties to D. and accounts of royalties for past manufacture. Previously to the issue of the writ, D.'s solicitor had written to F.'s solicitors that B.'s patent was within D.'s patent, and claims would be made in the action then intended in respect of articles made under B.'s patent. B. sued D. under sect. 32 of the Patents, Designs, and Trade Marks Act, 1883, for an injunction to restrain threats:—*Held*, that D.'s action was an action for infringement within the meaning of that section, and as it had been brought with due diligence the section did not apply, and B.'s action was stayed. Barrett *v.* Day. Day *v.* Foster - - **435**

2. —— *Action—Particulars of Objections—Successful Defendant—Costs—Certificate—Taxation—Patents, Designs, and Trade Marks Act*, 1883, *s.* 29, *sub-ss.* 2, 6.] Where, at the trial of a patent action in which the Defendant has delivered particulars of objections pursuant to sect. 29, sub-sect. 2, of the Patents, Designs, and Trade Marks Act, 1883, the Plaintiff's case breaks down at the opening on the sole ground that his specification shews that the alleged invention is not a proper subject for a patent, so that it becomes unnecessary to go into the Defendant's case at all, and the Court consequently gives judgment for the Defendant with costs, the Defendant is not entitled, on taxation, to the costs of his particulars of objections, since the Court will not in such a

PATENT—*continued.*

case go into the particulars merely for the purpose of certifying for those costs under sect. 29, sub-sect. 6.—But, *semble*, when the case has been decided upon the result of the Defendant's cross-examination of the Plaintiff's witnesses, and not merely on the question of the validity of the specification itself, it may be proper for the Court to look into the particulars with a view to certifying for the costs of them. Longbottom *v.* Shaw - - - - - - **46**

3. —— *Petition for Revocation—Respondent domiciled and resident out of Jurisdiction—Service—Notice—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 26—*Rules of Supreme Court*, 1883, *Order* XI., *r.* 1.] The sole Respondent to a petition for the revocation of a patent was a domiciled Scotchman, who was resident in Scotland. A copy of the petition and of the Petitioners' particulars of objection had been delivered to him personally in Scotland, and he had written to the Petitioners' solicitors saying that he did not intend to appear on the hearing of the petition, because he was not under the jurisdiction of the English Courts.—Upon an application by the Petitioners for directions as to the mode of trial:—*Held*, that, though there had not been, and could not under the Rules of Court be, any service of the petition out of the jurisdiction, yet, as ample notice had been given to the Respondent, the Court could make an order nisi, that, unless the Respondent should, on or before a specified day, appear and shew cause to the contrary (in which case it would be open to him to dispute the jurisdiction), the petition should be tried with vivâ voce evidence, and be set down for trial in the list of witness actions. *In re* Drummond's Patent - - - **80**

PERPETUITY—Contingent remainder **246, 401**
See Will. 2, 6.

PETITION—Winding-up—Locus standi of petitioner - - - - **99**
See Company 5.

PLEADING—Amendment of - - **187**
See Practice. 1.

—— Default of—Judgment—Foreclosure action.
See Practice. 9. [287

POWER—*Execution—Exclusion of Will—Express Reference—General Bequest—Wills Act, s.* 27.] Under an indenture of settlement trustees were to hold a sum of railway stock for such persons as the settlor should by writing under his hand (not being a will or codicil) or by a will or codicil expressly referring to the power appoint.—The settlor by will bequeathed his personal estate to trustees, not making any reference to the power: —*Held* (by Kekewich, J., and by the Court of Appeal), that this bequest did not operate under sect. 27 of the Wills Act (1 Vict. c. 26) as an execution of the power.—*In re Marsh* (38 Ch. D. 630) overruled. Phillips *v.* Cayley **C. A. 222**
See also Charles *v.* Burton - **223, n.**

2. —— *Execution—Validity—Special Power—Fraud on Power—Appointment to Object of Power with directions for Settlement—Appointment of "Residue" to Object of Power—Absolute Appointment—Trust for Persons not Objects of Power.*] Under a settlement, made in 1828, a testator had

POWER—*continued.*

power to appoint by will to and among his children a sum of £35,000. By his will, made in 1865, he bequeathed £150,000 to his daughter Jessy, and directed that this legacy should be paid to four trustees named in the will, and should be held by them upon trust for her during her life, with remainder for her issue. The will then recited the power of appointment contained in the settlement, and by virtue of that power the testator appointed £10,000, part of the £35,000, to the same daughter; but his will was that the same should be paid to the trustees thereinbefore named with reference to the legacy of £150,000, and should be held by them upon the trusts thereinbefore declared thereof. The testator then appointed two sums of £10,000 and £7000 respectively in favour of two other daughters, and he appointed the residue of the £35,000 to his son Robert absolutely. And, in case he had exceeded his power in not appointing the £10,000 to his daughter Jessy unconditionally, but in directing the settlement thereof, and in case his said daughter or her husband, or others having any right or power to object to the settlement thereof as aforesaid, should so object, or should not confirm such settlement, if required so to do, then he appointed that the said sum of £10,000 should go and belong to his son Robert, "but who will I am assured settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid so as thereby to carry out my wishes." After the testator's death the son Robert executed a declaration of trust of the £10,000 to carry out his father's wishes. There was no evidence (other than the will itself) of any bargain between the son and the testator that the former would settle the £10,000:—*Held*, that the appointment of the £10,000 in favour of the daughter Jessy was invalid; that the £10,000 did not pass to the son under the appointment of the residue to him; but that, under the last appointment to him, there being only an expression of the testator's wish, and no evidence of any bargain by the son that the fund should be settled, it passed to him absolutely, free from any obligation to settle it, and was, therefore, validly appointed.—*In re Marsden's Trust* (4 Drew. 594) commented on and explained. *In re* CRAWSHAY. CRAWSHAY *v.* CRAWSHAY - - - 615

—— Execution by will—Confirmation of will
See WILL. 1. [75

—— Of borrowing—Building society - 158
See BUILDING SOCIETY. 2.

PRACTICE — *Amendment at Trial — Pleading Judgment in former Action—Rules of Supreme Court*, 1883, *Order* XIX., *r.* 15; *Order* XXVIII., *r.* 1.] An action was brought against A. and B. for wrongful removal of furniture. At the trial it appeared from the evidence of the Plaintiffs that they had recovered judgment in an action against other persons who had joined in the removal. After the evidence for the Plaintiffs and for A. had been taken, B. asked for leave to amend by pleading the judgment, and A. thereupon made the same application. North, J., refused the application, and on the merits gave judgment for the Plaintiffs. A. appealed:—*Held*, by the Court of Appeal, that on the pleadings as they stood A. could not avail himself of the judgment in the former action, for that it ought to have been pleaded:—*Held*, also, that leave to amend had been rightly refused at the trial. EDEVAIN *v.* COHEN - - - - C. A. 187

2. —— *Appeal—Time for appealing—Interlocutory or Final Order—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15.] An appeal by a Plaintiff from a judgment dismissing his action having been dismissed with costs, the Plaintiff moved for liberty to set off against the costs payable to the Defendant L. under that order certain costs payable to the Plaintiff by L. partly in that action and partly in another action between the same parties. G. claimed a lien upon these costs for his costs as L.'s solicitor in the first-mentioned action. Kay, J., made an order allowing the set-off, but as regards the costs in the secondly mentioned action subject to any lien G. could make out before the Taxing Master for his costs in the firstly mentioned action. G. appealed:—*Held*, that as regards time for appealing, the order was interlocutory and not final, being only an order for working out the rights given by a final judgment. BLAKEY *v.* LATHAM - - C. A. 23

3. —— *Appeal—Time for appealing—Order in Chambers—Motion to Discharge Final Order—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 50—*Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15—*Originating Summons — Mortgage—Priority—Rules of Supreme Court*, 1883, *Order* LV., *rr.* 3, 5 *A*.] A motion to discharge or vary a final order made in Chambers must be brought within twenty-one days.—*In re Johnson* (42 Ch. D. 505) approved.—Where a party moved to discharge a final order made in Chambers after the expiration of twenty-one days, and the Judge refused to hear it because it was too late, *quære* whether the motion was made within the terms of the 50th section of the Judicature Act, 1873, so as to give the party a right to appeal. The procedure by originating summons is only intended for the decision of simple questions between the plaintiff and defendant. Therefore, where a mortgagee had taken out an originating summons for foreclosure or sale under Order LV., r. 5 A, the Court refused to decide the question of priority between two mortgagees. *In re* GILES. REAL AND PERSONAL ADVANCE COMPANY *v.* MICHELL - - - C. A. 391

4. —— *Compromise of Action—Application to set aside—Summons—Jurisdiction.*] An application to set aside an agreement for the compromise of an action cannot be made by a summons in the action; a fresh action must be brought for the purpose.—*Gilbert* v. *Endean* (9 Ch. D. 259) followed.—An agreement having been entered into for the compromise of an action, the Plaintiff took out a summons in the action to set it aside. The objection was taken in Chambers that the compromise could not be set aside on a summons. After this the Plaintiff filed his affidavits; the Defendant then filed his affidavits and cross-examined the Plaintiff's witnesses:—*Held*, that the Defendant had not by his conduct waived the objection. The summons was accordingly dismissed. EMERIS *v.* WOODWARD - - 185

5. —— *Contempt — Sequestration — Payment into Court — Performance of a Duty—Death of*

PRACTICE—*continued.*

Contemnor—Revivor—Order for Sale—Administration—Insolvent Estate—Rules of Supreme Court, 1883, *Order* XLIII., *r.* 6—*Judicature Act,* 1875, *s.* 10—*Bankruptcy Act,* 1883, *s.* 45.] A trustee having failed to comply with an order directing him to pay money into Court, a writ of sequestration was issued against his estate and effects, and subsequently the sequestrators were authorized to sell certain chattels in their possession belonging to the trustee. Before any sale was effected the trustee died, and a creditor's action was brought, in which the usual judgment was made and a receiver appointed. The trustee's estate was insolvent, and the receiver and the administrator of the deceased trustee commenced an action against the sequestrators to restrain them from selling the chattels and moved for an injunction:—*Held,* on the authority of *Hyde* v. *Greenhill* (1 Dick. 106), that sequestration to compel the performance of a duty is not determined by the death of the person against whose estate and effects sequestration has been issued; and proceedings may therefore be continued against his legal personal representative.—*Held,* also, that sect. 45 of the Bankruptcy Act, 1883, restricting the rights of creditors under execution or attachment, is not made applicable to the administration of insolvent estates in the Chancery Division by the Judicature Act, 1875, sect. 10.—Motion accordingly refused. PRATT *v.* INMAN - 175

6. —— *Continuance of Action by Executor and Devisee—Action for Mandatory Injunction and Damages—Death of sole Plaintiff—*3 & 4 *Will.* 4, *c.* 42, *s.* 2—*Rules of Supreme Court,* 1883, *Order* XVII., *rr.* 1–4; *Order* XXXVI., *r.* 58.] The sole Plaintiff in an action for a mandatory injunction and damages for obstruction to the access of light to a freehold house, having died more than six months after the issue of the writ, B., the executor and devisee, obtained the common order to carry on proceedings. On motion to discharge this order for irregularity, on the ground that the cause of action did not continue, and that there was no transmission of interest to B.:—*Held,* that though any action by B., as executor, for injury to the Plaintiff's real estate might, under 3 & 4 Will. 4, c. 42, s. 2, be limited to the six months prior to the Plaintiff's death, still he could recover damages to this extent: that, with regard to the peculiar equitable remedy to have the obstruction to light removed, this was an equitable right subsisting in the Plaintiff at the time of her death, which, with the equitable remedy by mandatory injunction, devolved to B. as her devisee, and consequently that proceedings could properly be carried on by B. Motion accordingly refused. JONES *v.* SIMES - - - - 607

7. —— *Discovery—Production of Documents—Specific Performance of Agreement to accept Lease—Right to production of Lessor's Freehold Title—Vendor and Purchaser Act,* 1874 (37 & 38 *Vict. c.* 78), *s.* 2—*Interpretation Act* (13 & 14 *Vict. c.* 21), *s.* 4.] The Plaintiffs agreed to grant and the Defendant to accept a lease of a house and land, the lease to contain stipulations for the free use by the Defendant of a drive leading to the house. The Plaintiffs having brought their action to compel the Defendant to take the lease, the Defendant by his statement of defence denied the Plaintiffs' title to demise the land and house, and alleged that they were subject to restrictive covenants, and also that the drive was not on land of the Plaintiffs, and that they had no power to give an easement over it. The Defendant applied for production of the Plaintiffs' title deeds, which they had scheduled as relating only to their freehold title:—*Held,* by North, J., that, by virtue of sect. 2 of the Vendor and Purchaser Act, 1874, the Defendant was not entitled to production of the deeds shewing the Plaintiffs' title to the house and land, but that he was entitled to production of the deeds shewing their title to the right of way: *Held,* on appeal, that this decision as regarded the deeds shewing the title to the house and land was right, but that an agreement for a right of way during the lease was an agreement for a lease of land within the meaning of the Act, that the deeds shewing a title to grant a right of way were therefore in the same position as the other deeds, and the Plaintiffs were not bound to produce them: *Held,* that the section did not prevent the purchaser from proving aliunde that the title was bad, and that, if he had raised a definite objection which the Court could try, he would have had the usual right of a litigant to production of documents in the possession of the other party which were relevant to the issue so raised, but that he acquired no such right by a mere denial of the Plaintiffs' title, or by a vague general allegation that the property was subject to restrictive covenants. JONES *v.* WATTS **C. A.** 574

8. —— *Equitable Execution—Appointment of Receiver—Abatement—Rules of Supreme Court,* 1883, *Order* XVII., *r.* 1—*Order* XLII., *r.* 23.] S. being entitled to a freehold subject to a mortgage, a judgment creditor shortly before the death of S. applied for a receiver by way of equitable execution. The application was adjourned, and in the meantime S. died intestate. Two days after his death an order for a receiver was made without reviving the action or bringing the heir-at-law before the Court:—*Held,* by the Court of Appeal, that the order was ineffectual, having been made after the death of S. and in the absence of any person to represent his estate. What is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Assuming, therefore, that execution at law can be issued against the estate of a deceased person without any leave of the Court (as to which *quære*), a receiver by way of equitable execution cannot be appointed of the estate in the absence of the persons on whom the estate has devolved. Order XVII., r. 1, does not keep an action alive as against the estate of a deceased party unless the estate has devolved on some one who is a party to the action. Order of Chitty, J., affirmed. *In re* SHEPHARD. ATKINS *v.* SHEPHARD **C. A.** 131

9. —— *Judgment in default of Pleading—Admissions by Defendant—Foreclosure Action—Personal Judgment against Mortgagor—Form of Judgment—Rules of Supreme Court,* 1883, *Order*

PRACTICE—*continued.*

XIX., r. 13*; Order XXVII., r.* 11*; Order LV., r.* 5A.] The Defendant to a foreclosure action did not appear to the writ. The Plaintiff by his statement of claim alleged that a specified amount was due to him in respect of principal and interest, but asked that an account might be taken of what was due. On a motion by the Plaintiff for judgment in default of pleading, the Defendant did not appear:—*Held*, that, as the Defendant had not appeared on the hearing of the motion, the Plaintiff was, notwithstanding the Defendant's omission to plead, not entitled to any relief which he had not asked by his statement of claim, and that, consequently, he was not entitled to immediate judgment upon the Defendant's covenant for payment of the amount alleged to be due, but that the judgment must be for payment of the amount found to be due upon taking the account in Chambers. FAITHFULL *v.* WOODLEY - 287

10. —— *Originating Summons—Jurisdiction—Rules of Supreme Court*, 1883, *Order LV., r.* 3.] A testator directed his trustees to allow his wife to carry on his farming business during widowhood, and to pay to her during widowhood the income of his residuary estate. Four years after his death one of his executors took out an originating summons under Order LV., rule 3, against the other executor and the widow, asking whether a sum of £171, which the testator had handed to his widow shortly before his death, and which stood in her name at a bank, belonged to her or to his estate, and whether she was bound to render to the executors any account of the farming business. The widow objected to the jurisdiction as to the £171, but Kekewich, J., overruled the objection, and made an order declaring the sum to be part of the testator's estate:—*Held*, on appeal, that there was no jurisdiction on originating summons to decide adversely to the widow that the sum belonged to the testator's estate, this not being a matter which could be decided in an administration suit, but, the widow assenting to have the case tried, the Court heard it on the merits, and held that the evidence shewed a good gift to the widow. *In re Davies* (38 Ch. D. 210) approved. *In re* ROYLE. ROYLE *v.* HAYES **C. A.** 18

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PROOF OF DEBTS—Winding-up—Salary of managing director - - - 255
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PURCHASE-MONEY—Sale under Settled Land Act—Application - - - - 84
See SETTLED LAND ACT.

RAILWAY COMPANY—*Parliamentary Deposit—Insolvency—Abandonment of Railway—Private Act—"Order to Wind up"—Crown, Rights of—Depositors—Creditors—Landowners—Priorities—Compulsory Powers—Notice to Treat—Abortive Contract—"Loss or Damage."*] By the Uxbridge and Rickmansworth Railway Act, 1881, incorporating the Lands Clauses Consolidation Act, 1845, provision was made in sect. 34 for the return of the parliamentary deposit to the depositors on the completion of the railway; and sect. 35, which was in common form, enacted that, if the railway was not completed and opened by the time fixed, the deposit should be applicable towards the compensation of landowners and other persons whose property had been interfered with, "or who had been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act;" and if no such compensation was payable, the deposit should either be forfeited to the Crown, "or in the discretion of the Chancery Division, if the company is insolvent and has been ordered to be wound up," or a receiver appointed, should be paid to such receiver or to the liquidator of the company, "or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."—The company having become insolvent, the Uxbridge and Rickmansworth Railway (Abandonment) Act, 1888, which was in common form, was passed, authorizing the company to abandon their railway; and sect. 4 enacted that where, before the passing of that Act, any contract had been entered into or notice given by the company for the purchase of land, the company should be released from all liability to purchase or complete the purchase of such land, but that compensation should be made by "the company" to the owners and occupiers, or other persons interested in such land, "for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice," such compensation to be ascertained under the Lands Clauses Consolidation Act. Sect. 5 enacted that "subject to the provisions of this Act, and of sect. 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors," the Court might order the return of the deposit to the depositors. Sect. 6 enacted that "Forthwith after the passing of this Act the

RAILWAY COMPANY—*continued.*

company shall proceed to wind up their affairs, and shall pay, satisfy and discharge all their debts, liabilities and engagements," whereupon (sect. 7) "the company shall be by this Act dissolved." At the time of the passing of the Acts of 1881 and 1888 there was no jurisdiction in the Chancery Division to make any such order for winding-up a railway company as was referred to in sect. 35 of the Act of 1881, and there was no general Act under which a railway company could be wound up at all.—Under an inquiry directed upon a petition by the depositors for the return of the deposit, questions arose as to the rights of claimants against the fund:—*Held*, by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), reversing Stirling, J., that by sect. 6 of the Act of 1888 the company had been "ordered to be wound up" within the meaning of sect. 35 of the Act of 1881; that the right of the Crown under the latter section was excluded by sect. 5 of the Act of 1888; and that, subject to the prior claims, if any, under sect. 35 of the Act of 1881, of landowners and other persons injured, the deposit was applicable to the payment of creditors pari passu, including, as creditors, any landowners who might prove injury or damage under sect. 4 of the Act of 1888:—*Held* also (affirming Stirling, J.), that "in consequence of the compulsory powers" of the company, in sect. 35, meant in consequence of the "exercise" of the compulsory powers; and that the mere service of a notice to treat, even if followed by a contract, was not an exercise of compulsory powers, so as to entitle the landowner to priority under sect. 35: *Held* also, that even if giving notice to treat was an exercise of compulsory powers, expenses incurred by the landowner to his solicitor and surveyor in consequence of the notice, whether followed or not by a subsequent abortive agreement for purchase, did not constitute loss or damage either under sect. 35 or under sect. 4. *In re* UXBRIDGE AND RICKMANSWORTH RAILWAY COMPANY - - - - C. A. 536

2. —— *Sale of Surplus Lands with House thereon—Light and Air—Implied obligation to Purchaser—Access of Light through Railway Arches—Interference with Light by Person claiming under Company.*] A railway company sold a piece of their surplus land to the Plaintiff, together with a house, which they had allowed him to erect thereon. The house was close to their line of railway, which there ran over a series of arches, through two of which there was some access of light to two of the lower windows of the Plaintiff's house. The company retained in their own hands lands on the other side of the railway opposite the Plaintiff's house; and their conveyance to him contained a recital that all the land acquired by them other than that sold to the Plaintiff would be required by them for the construction of their railway, and it contained no express grant of right, or covenant as to light.—The Defendant's predecessor in title afterwards acquired from the company, under a conveyance subject to any right of light which the Plaintiff might have, the fee of the lands opposite the Plaintiff's house, and erected buildings thereon, and he also took a lease of the arches. The Defendant subsequently acquired this property, and blocked up the openings of the two arches nearest the Plaintiff's house with hoardings.—*Held*, that the company, on selling a portion of their surplus lands to the Plaintiff, had entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with the Plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway; and that, the hoarding not being for that purpose, a mandatory injunction ought to be granted.—Judgment of Kekewich, J., affirmed. MYERS *v.* CATTERSON [C. A. 470

RECEIVER—appointment after death of debtor
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RES JUDICATA—Compromise - - 296
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RESTRAINT OF ANTICIPATION—Forfeiture of gift in will - - - - 630
See WILL. 3.

RESTRAINT OF TRADE—*Covenant not to carry on particular Trade—Carrying on Part of Trade.*] By a lease of a house, No. 10, the lessors covenanted not to permit or suffer to be carried on at No. 11 or 12 the business of ladies' outfitting, nor give their consent to its being carried on at No. 9. Afterwards the assigns of the lessors demised No. 9 to the Defendants, who covenanted not to carry on there the business of ladies' underclothing, except vests and stockings. The Defendants when they took their lease had notice of the covenant in the lease of No. 10. The lessee of No. 10 sued for an injunction to restrain the Defendants from carrying on at No. 9 the business of ladies' outfitting. All that was proved was, that the Defendants, who were hosiers, sold four classes of articles, the sale of which was an essential part of the business of ladies' outfitters, but which were also commonly sold by hosiers:—*Held*, by Kekewich, J., that as the sale of these articles was an essential part of the business of a ladies' outfitter, the Plaintiff was entitled to an injunction:—*Held*, by the Court of Appeal, that, assuming the lessees of No. 9 to be under an obligation which the Plaintiff could enforce against them by action, not to carry on the business of ladies' outfitters, the action must be dismissed, on

RESTRAINT OF TRADE—*continued.*
the ground that they were not shewn to have done so, for that the bonâ fide sale by hosiers, along with numerous other articles, of certain articles of hosiery, the sale of which was an essential and important part, but not nearly the whole, of ladies' outfitting, was no breach of the obligation, there being no covenant that the lessees of No. 9 would not carry on any part of the business of ladies' outfitters.—*Feilden* v. *Slater* (Law Rep. 7 Eq. 523) distinguished.—Whether the lessees of No. 9 were under any obligation not to carry on the business of ladies' outfitters on which the lessee of No. 10 could sue them, *quære.* STUART *v.* DIPLOCK - - - - **C. A. 343**

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—— **Order XV., r. 1** - - - - 70
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—— **Order XVI., r. 8** - - - - 183
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—— **Order XVII., r. 1** - - - 131
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—— **Order XIX., r. 13** - - - 287
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—— **Order XLII., r. 23** - - - 131
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—— **Order XLIII., r. 6** - - - 175
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—— **Order LXIV., rr. 7, 14** - - - 310
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SEQUESTRATION — Death of person in contempt - - - - 175
See PRACTICE. 5.

SERVICE—Out of jurisdiction—Petition for revocation of patent - - - 80
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SETTLED LAND ACTS—*Different Estates—Same Tenant for Life—Application of Capital Moneys arising from one Estate for Improvements on another subject to the same Limitations—Interposition of Term of Years on one of the two Estates—Discretion of Tenant for Life—Costs of Surveyor and Solicitor of Tenant for Life—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 2, 5, 20, 21, 24, 26, 53.] The powers conferred by the Settled Land Act, 1882, upon a tenant for life are, pursuant to sect. 53, to be exercised with a due regard to the interests of all parties entitled under the settlement, and the discretion vested in him by the Act as to the application of capital moneys must not be so exercised as unduly to prejudice such parties, but where it is a matter of doubt, then the discretion of the tenant for life, if fairly exercised, ought to prevail.—Four estates, A., B., C. and D., were devised by the same will in trust for the same tenant for life. After her death estates A., B. and C. were devised to different persons in strict settlement, and a long term of years was created in estate D., subject to which such estate was devised as to one moiety to the uses of estate A., and as to the other moiety to the uses of estate B. The trusts of the term were for the payment off of the incumbrances on all four estates in the order in which they were devised.—Upon an application by the tenant for life:—*Held*, that, notwithstanding the interposition of the term of years, estate B. and one moiety of estate D. constituted one settled estate within the meaning of the Settled Land Act; and that capital moneys arising from the moiety of estate D. were applicable for improvements on estate B.: it appearing that this application of the moneys, though it might delay, would not endanger the payment of the incumbrances on the other estates:—*Held*, also, that the costs as between solicitor and client of the solicitor and surveyor of the tenant for life for preparing and carrying out the necessary schemes for such improvements, were costs incidental to the application and were payable out of the capital moneys arising from estate B. and the moiety of estate D.—The Settled Land Act, 1882, s. 5, s. 20, sub-s. 2, s. 21, sub-ss. 2, 5, and 10, s. 24, sub-ss. 2, 5, and s. 53, explained. *In re* LORD STAMFORD'S SETTLED ESTATES - 84

SETTLEMENT — *Wife's after-acquired Property —Covenant by Husband to Settle—Wife's Reversionary Interest—Fund falling into Possession after Wife's Death—"During Coverture"—Implied Restriction of Covenant.*] A general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives, though it will be so restricted when the wife survives.—By a marriage settlement made in 1841 certain property belonging to the wife (who was a minor)

SETTLEMENT—*continued.*
was settled, and it was agreed and declared and the husband covenanted with the trustees that if the wife, or he in her right, should become entitled to any other property whatsoever the same should be settled on the trusts of the settlement.—At the date of the marriage the wife was, under a settlement made in 1833, entitled to a vested interest in an unascertained share of a settled fund in reversion expectant upon the death of the survivor of certain persons. The wife died in 1852, leaving the husband her surviving, and the reversionary fund did not become divisible until 1888, when the husband was still living :—*Held*, that the wife's share in the fund was bound by the husband's covenant and must be paid to the trustees of the marriage settlement. FISHER *v.* SHIRLEY - - - 290

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—— Investments—Breach of trust - 296
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—— Power to accept, in satisfaction of debt 198
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SHIP—*Maritime Lien—Towage.*] There is no maritime lien for ordinary towage services rendered to a ship. WESTRUP *v.* GREAT YARMOUTH STEAM CARRYING COMPANY - - - 241

SOLICITOR—*London Agent of Country Solicitor —Interest on Costs.*] W. was the country solicitor of the Sittingbourne and Sheerness Railway Company. L. agreed to act as his London agent in the company's business on the usual agency terms, except that L. should not call on W. to pay any of his agency bills until W. had obtained payment of his bill of costs from the company. There was difficulty in obtaining payment from the company, but ultimately, by means of a litigation which lasted eleven years, W. obtained payment from the company of the amount of his bill of costs, with a considerable sum for interest: —*Held*, by Chitty, J., that in taking the accounts between W. and L., W. must bring into account the interest received by him from the railway company :—*Held*, by the Court of Appeal, that the usual agency terms being that the agent should be repaid his disbursements, and receive, not half the profits, but half the profit charges whether they were paid by the client or not, he was entitled to nothing more, and could not claim to participate in the interest; for that although his suspending his right to payment would have made a stipulation for interest reasonable, the Court could not import such a stipulation from the mere fact of his agreeing not to claim payment till W. had received the amount of his bill.—The order of Chitty, J., was therefore discharged. WARD *v.* LAWSON **C. A.** 353

2. —— *Mortgage to Solicitor—Solicitor's Remuneration—Profit Costs, Right to charge.*] A solicitor cannot charge his client with profit costs for the preparation of a mortgage from the client to himself. *In re* ROBERTS - - - 52

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3 & 4 Will. 4, c. 42, s. 2—*Amendment of Procedure* - - - - 607
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1 Vict. c. 26, s. 27—*Wills* - - - 222
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15 & 16 Vict. c. 51, s. 24—*Copyholds* - 519
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17 & 18 Vict. c. 112, ss. 30, 33—*Literary and Scientific Institutions* - - 236
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17 & 18 Vict. c. 125, s. 11—*Common Law Procedure* - - - - 150
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44 & 45 Vict. c. clxxv.—*Uxbridge and Rickmansworth Railway* - - 536
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TRADE MARK—*Registration—" Satinine "—Descriptive Word—" Invented Word "—" Word having no reference to character or quality "—Patents, Designs and Trade Marks Act,* 1888, *s.* 10—*Patents, Designs and Trade Marks Act,* 1883, *s.* 64.] The word " Satinine," applicable to goods in Classes 47 and 48 in Schedule 3 to the Trade Marks Rules, 1883, comprising starch, blue, and other preparations for laundry purposes and perfumery :—*Held*, to be a descriptive word, and therefore not registrable as " an invented word " or " a word having no reference to the character or quality of the goods," under sect. 10 of the Patents, Designs and Trade Marks Act, 1888, which is substituted for sect. 64 of the Patents, Designs and Trade Marks Act, 1883. *In re* Meyerstein's Trade Mark 604

TRUSTEE—*Investment—Benefit Building Society—Trust Investment Act,* 1889 (52 *&* 53 *Vict. c.* 32), *s.* 3.] Funds of a benefit building society invested in the names of trustees for the society under the direction of the board are not trust funds subject to the powers conferred by the Trust Investment Act, 1889. *In re* National Permanent Mutual Benefit Building Society - - - 431

2. —— *Investment—Corporation holding Funds for Charitable Purposes—Trust Investment Act,* 1889 (52 *&* 53 *Vict. c.* 32), *ss.* 3, 5, 6, 7, 9.] A corporation incorporated by a special Act held funds for charitable purposes :—*Held*, that the corporation were trustees within the meaning of the Trust Investment Act, 1889, and were entitled to invest any trust moneys in their hands on any of the securities mentioned or referred to in sect. 3 of that Act, unless they were expressly forbidden to do so by the instrument creating the trust. But *held*, that if a trustee has not, under the instrument creating his trust, power to vary the investments of the trust funds, sect. 3 does not authorize him to sell existing investments for the purpose of re-investing the proceeds on securities mentioned therein. *In re* Manchester Royal Infirmary. Manchester Royal Infirmary *v.* Attorney-General - - - - 420

3. —— *Investment—Purchase of Equity of Redemption—Breach of Trust—Previous Administration Action compromised—Res Judicata.*] In 1874 A. settled certain funds upon trust for himself for life, and after his death upon trust, as to one-fifth, for W. and his children. By the settlement A. reserved to himself for life the power to direct the investments of the trust funds as though he were absolute owner; and, after his death, the trustees were empowered to invest the trust funds upon freehold, leasehold, or chattel real securities " including equitable mortgages by a deposit," with the usual power to vary investments. The settlement also contained the usual power to invest in the purchase of freeholds or long leaseholds. In 1877 A. died, and at that time £6400, part of the trust funds, stood invested on second mortgage of certain freeholds and leaseholds, S. being the mortgagor. In 1878 S. became financially embarrassed, foreclosure or sale by the first mortgagees was imminent, which would have resulted in the total loss of the £6400, and thereupon the trustees, acting bonâ fide and with a view to save the trust estate, purchased of S. his equity of redemption for £2000. In 1879 L., a beneficiary, commenced an action against the

TRUSTEE—*continued.*

trustees and W., alleging improper investments, and claiming administration and accounts on the footing of wilful default. The trustees, in their answers to interrogatories, set out clearly the circumstances attending the purchase of the equity of redemption. In 1880 the usual judgment for administration was obtained, including an inquiry as to the improper investments. In 1881, before the Chief Clerk made his certificate, a compromise of the action was sanctioned by the Court on petition, to which all parties interested (including W.'s children) were parties, under which L.'s share of the trust estate was raised and paid out to her, and all further proceedings in the action were stayed. The petition did not refer to the alleged breaches of trust. In April, 1888, W.'s children commenced an action against the same trustees alleging that the purchase of the equity of redemption was a breach of trust and claiming usual relief. The Defendants denied the breach of trust and asserted that under the circumstances the purchase was prudent and proper. They also pleaded the order of compromise in the first action in bar of the Plaintiff's claim:—*Held*, (1) that the purchase of the equity of redemption was an unauthorized investment and a breach of trust; (2) that the compromise was not a bar to the Plaintiff's claim, the breach of trust not having been by negligence, inadvertence, or accident, omitted to be brought before the Court on the hearing of the petition. *Henderson* v. *Henderson* (3 Hare, 100) discussed. Worman *v.* Worman - - - - 296

—— Representing cestui que trust—Foreclosure action - - - - - 183
See Mortgage. 1.

WILL — *Construction — Codicil — Confirmation — Execution of Special Power.*] An ante-nuptial settlement of personal estate gave the survivor of husband and wife (in the events which happened), "after the decease of the other of them," a testamentary power of appointment among their children. During the life of the wife the husband made a will containing a residuary devise and bequest in favour of his children of all property he "might be possessed of or over which he might have power of bequest or disposal" at the time of his death. After the death of his wife the husband made a codicil confirming his will:—*Held*, that though he could not execute the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will, and the power had been duly executed. *In re* Blackburn. Smiles *v.* Blackburn - - - - - 75

2. —— *Construction—Contingent Remainder—Remoteness—Possibility upon a Possibility.*] A testator, who died in 1870, by his will dated the same year, devised a freehold estate to the use of his sons and their heirs during the life of his daughter, E., upon trusts for such daughter; and after her decease "to the use of any husband whom she may hereafter marry," during his life; and after the death of the survivor of his daughter, and such husband to the use of the children of his daughter as she should appoint, and in default of such appointment, to the use of all the children of his daughter who should be living at the death of the survivor of her and her husband, or should have previously died leaving issue then living, in equal shares; but in case no child of his daughter should be living at the death of such survivor, or should have previously died leaving issue then living, then to the use of such of his sons and of his other daughters as should be then living, or should have previously died leaving issue then living, in equal shares. The will contained a gift of residue. The daughter, E., was a spinster at the testator's death, but subsequently, in 1872, married and died shortly afterwards without issue. Her husband died in 1888:—*Held*, that the limitations subsequent to the life estate of the daughter's husband were void for remoteness, and that on his death the devised estate passed under the residuary gift. *Cole* v. *Sewell* (4 D. & War. 1; 2 H. L. C. 186) considered. *In re* Frost. Frost *v.* Frost - - - - - 246

3. —— *Construction—Forfeiture Clause—Gift of Life Interest to Married Woman for her Separate Use without power of Anticipation—Gift over "on her anticipating" the Income—Mortgage of Life Interest.*] A testator gave a fund to trustees, upon trust to pay the income to his sister "for her separate use, free from the debts and control of any husband, without power of anticipation, and for and during the term of her natural life, and from and after her decease or on her anticipating" the income, or any part thereof, the principal was to be on trust for her children equally. At the time of the testator's death the sister was married. The husband was still living. The sister executed a deed assigning her life interest by way of mortgage:—*Held*, that "anticipating" could not be read as meaning "attempting to anticipate," and that, as, by reason of the restraint on anticipation during coverture, the assignment of the life interest was wholly inoperative, there had been no forfeiture. *In re* Wormald. Frank *v.* Muzeen - - 630

4. —— *Construction—Forfeiture Clause—Absolute Gift—Bankruptcy—Annulment—Reversions—Time of Annulment.*] A testator by his will gave personal estate to his children as tenants in common. He then gave to trustees real estate and personal estate on trust to pay the rents and profits to his children as tenants in common during their lives, with benefit of survivorship. He then gave certain reversions to the trustees on similar trusts. He then provided that if by act or operation of law any interests given by his will in trust for his children should be aliened whereby the same should vest in any other person, then his trustees should apply the interest so aliened to and among the other persons entitled to the same by survivorship, as in the case of the death of the person so aliening.—One of his children was at the time of his death a bankrupt. Within a year afterwards she became entitled to property which when sold was sufficient to pay her debts and the costs, but the bankruptcy was not annulled until more than two years after that:—*Held*, that as to the absolute gift of a share of personal estate the clause of forfeiture was repugnant and had no effect:—*Held*, that with respect to estates in remainder not come into

WILL—*continued.*

possession before the annulment, personal enjoyment by the legatee was not interfered with, and the forfeiture did not take effect:—*Held*, that, in ascertaining for this purpose when the annulment took place, the time when the bankrupt came into legal possession of property enough to pay the debts and costs, and not the time of the actual annulment, must be taken.—The question of forfeiture is not affected by sect. 81 of the Bankruptcy Act of 1869, corresponding with sect. 35 of the Act of 1883. Metcalfe *v.* Metcalfe 633

5. —— *Construction—Gift to a class—Direction that should any of them be dead before the Testatrix his or her Share should be equally divided between his or her Children—Children of Member of class who was dead at Date of Will.*] A testatrix, by her will, gave the residue of her property to be equally divided between her nephews and nieces, sons and daughters of her late brothers, G., J., W., and C., and then proceeded: "but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children":—*Held*, by the Court of Appeal, affirming the decision of Kay, J., that the children, living at the death of the testatrix, of nephews or nieces who were dead at the date of her will, did not take. *Christopherson* v. *Naylor* (1 Mer. 320) approved. *In re* Musther. Groves *v.* Musther - - - **C. A. 569**

6. —— *Construction — Power — Remoteness — Originating Summons—Rules of Supreme Court, 1883, Order* LV., *r.* 3.] H. devised real estate unto and to the use of trustees in fee upon trust to pay the rents to her sister M. for life, then to M.'s children successively for their lives, and after the death of M. and her children to her sister E., for life, and then to E.'s children successively for their lives, and after the deaths of M. and E. and all their children to hold the property on such trusts as the longest liver of M., E., and their children should by deed or will appoint, and in default of appointment upon trust for the heir of the testatrix. M. and E. survived the testatrix. The longest liver of M., E., and their children left a will by which she purported to appoint the property. The heir-at-law of H. claimed the property as undisposed of. The trustees of the will of H. took out an originating summons to have it decided to whom they ought to convey the property:—*Held*, by Kay, J., that he could not try an equitable ejectment on originating summons, and that the summons must be dismissed.—*Held*, by the Court of Appeal, that the case was within Order LV., r. 3, and could be tried on originating summons.—At the request of the parties, the Court of Appeal consented to decide the construction of the will, and held that as the person to exercise the power of appointment was not necessarily ascertainable within a life or lives in being and twenty-one years, the power was void, and the property on the death of the survivor of M. and E. and their children went as undisposed of to the heir-at-law.—*Avern* v. *Lloyd* (Law Rep. 5 Eq. 383) overruled. *In re* Hargreaves. Midgley *v.* Tatley - - - **C. A. 401**

7. —— *Construction—Satisfaction—Debt of Testator—Legacy to Creditor—Direction to pay Debts only.*] A direction by a testator that his "debts" are to be paid is sufficient, without the further direction to pay "legacies," to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt.—A lady gave a bond to her nephew, to whom she was not in loco parentis, to secure the payment of £1000, within twelve months after her death, to him, if he should be then living, or to his representatives if he should have died leaving issue him surviving, but not otherwise, with interest at £5 per cent. from her death. The bond was given on his marriage, and to the lady's knowledge was assigned by him to the trustees of his marriage settlement.—By her will she made various gifts to her nephew, including a legacy of £3000 to him absolutely. A codicil contained a direction that "all just and lawful debts" should be paid "at once":—*Held*, that the bond was not satisfied by the legacy, but that both were payable.—*Edmunds* v. *Low* (3 K. & J. 318) disapproved. *In re* Huish. Bradshaw *v.* Huish - - - - - - 260

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